



# **PREM'S CROSS-EXAMINATION AND ARGUMENTS**

Containing Law and Methods of Cross-Examination and  
Arguments with apt illustrations and  
hints on advocacy.

BY  
**DAULAT RAM PREM,**  
Advocate, High Court, East Punjab.  
*Author of Prem's Criminal Practice, Law and Methods of Police Investigation,  
Law of Arms and Explosives, Law of India or Civil Digest,  
Extradition Manual, etc.*

Approved by High Court.

**SECOND EDITION  
1947**

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## PREFACE TO THE SECOND EDITION

The warm and generous reception accorded to the First Edition of this book has greatly encouraged me to send forth its Second Edition, which deal with not only cross-examination but agreements as well.

The most difficult and certainly the most anxious and responsible Part of an Advocate's duties is the effective cross-examination of witnesses in a serious case. One indiscreet question may change the fate of his client. Cross-Examination is an art which like other arts requires patient and careful study. It is true that one cannot learn cross-examination merely by reading few books on the subject unless he actually handles few witnesses in a Court and undergoes the stress and strain of the trial. This book will serve him as a guide in dealing with certain types of witnesses. The experiences of eminent Counsel are placed at his disposal, by which he can avoid dangerous pitfalls. Model questions are given to aid the junior Counsels.

The chief characteristic of this Edition is the addition of few chapters on Arguments—both law and Method with illustrations.

I owe a deep gratitude to the authors and publishers of the following standard works, which have been copiously quoted in this book, Best on Evidence, Taylor on Evidence, Phipson on Evidence, Wigmore on Evidence, Monir on Evidence, Norton on Evidence, Ram on Facts, Moore on Facts, Cox's Advocate, Wellman on the Art of Cross-examination, Aiyer's Principles and Art of Cross-examination by C. S. Somanatha Sastri and P. Ramnatham, Harris' Illustrations in Advocacy, Wrottesley on the Examination of Witnesses, Rahmat Ullah's Art of Cross-examination, Sarkar's Hints on Modern Advocacy, Donovan's Tact in the Court, Sergeant Ballantyne's Experiences of a Barrister's Life, Morrison on Advocacy, Hardwick's Art of Winning Cases, Chitty's General Practice, Bentham's Rationale of Judicial Evidence, Will's Circumstantial Evidence, Jewitt's Dialogues of Plato, Narda Smriti, Earl of Birkenhead's Famous Trials of History, and Its Detection by W. T. Shore, the Police and Crime Detection To-day, by Reginald Morrish, Modern Criminal Investigation by H. Soderman of Stockholm University, Law Journal, Madras Law Journal, Madras Law Times, Bombay Law Reporter etc.

1st August, 1947.

DAULAT RAM PREM,

*Advocate*

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**The Hon'ble Mr. Justice Oma Shankar Bajpai, Judge, High Court, Allahabad.**

I have gone through portions of Prem's Criminal Practice and I found the book quite useful. The author has departed from the orthodox method of grouping cases section-wise and has followed better method of grouping cases subject-wise. The digest is fairly exhaustive and accurate and in my opinion Mr Daulat Ram Prem has supplied a long-felt want for an exclusive Criminal digest which is handy and yet so serviceable. I am sure the book will be found useful both by the Bar and the Bench.

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In Token of  
His Lordship's Legal acumen, Equipose,  
Gentle disposition, Urbanity and broad Sympathies.



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## PREMISES

# Cross-Examination and Argument

## CHAPTER I

### Object and Importance of Cross-examination.

The main object of cross-examination is to find out the truth and detection of falsehood in human testimony. It is designed either to detect or weaken the force of evidence a witness has already given in perjury or chief to tell me in your favour which he has not stated or to discredit him by showing, from his past history and present demeanour that he is unworthy of credit. The object of cross-examination from a litigious standpoint, not from a high moral ground of getting at the real truth and exposing falsehood and all that can from the purely litigious professional standpoint may be stated as follows:—*Firstly* it is to get something, no matter how small, to help your own case. If you fear further examination is dangerous, and absolutely futile, it is far better to leave it alone and far better to stop the witness if you feel that what you are getting is not as a fact aiding or assisting your client in the litigation. *See also*, another object is when you cannot get that which helps your client, try to get something to weaken your opponent but that is not by a different process entirely; and *thirdly*, I put it last although it is not the least by any means, it is to endeavour if you can to separate the truth from the falsehood more particularly if the truth told by your opposing witness would be of a assistance to your case. Now, how should we best attain this object? In what way are we going to further the interests of cross-examination? In order to give an answer to that it will be necessary to consider for a moment what evidence is, and I don't propose to enter upon any disquisition as to what evidence is or is not in a legal or technical sense but what I want to point out for the purposes of cross-examination is that evidence is not facts, but is the impression of facts, and the result of certain facts or certain things which have happened. Now the object of cross-examination is to reform these impressions, to re-narrate them to explain them, to question them if you will, to doubt them if you will, but the facts themselves are something quite apart from the evidence. There are no facts in evidence at all because evidence is merely a statement or a record of facts expressed through the witness box." 20 M. L. J., 279-280. (aylor on Evidence 5th Ed. Vol. II, p. 1211.; 11 Cr. L. J. 75.

"We should always remember that cross-examination is a duty we owe to our clients and is a matter of great personal glory or fame. Reward must be had for true administration of justice and that justice must not be defeated by improper cross-examination. The State has given a monopoly to our profession and we should render that to the State that is due to the benefit of public. Remember also that in cross-examination we owe duty to our client that we are bound to give our best that is in us in that not difficult art, however we may fail in the result; and so, if we fulfil all these obligations, our names will be recalled as those who regarded fairness as one of the great elements of advocacy, and whose talents and genius were not aimed at self-glorification but were used to establish truth, to detect falsehood, to uphold right and justice and to expose the wrong-doings of dishonest men." 20 M. L. J., pp. 371-372

## CROSS-EXAMINATION

"The object of cross-examination is not to produce startling effect but to elicit facts, which will support the theory intended to be put forward. *Ballantyne's Experience.*

Examination of a witness by the opposite party is called "cross-examination." Cross-examination is peculiarly a product of the English procedure, and in the time of Bentham was completely absent in other systems of procedure grounded upon the Roman. It is a vital feature of all modern systems of evidence and, in the words of Wigmore, "the greatest legal engine ever invented for the discovery of truth." The power and opportunity to cross-examine is one of the principal tests which the law has devised for the ascertainment of truth and this is certainly a most efficacious test. By this means the situation of the witness with respect to the parties and the subject of litigation, his interests, his motives, his inclination and prejudices, his means of obtaining correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discerning facts in the first instance and his capacity for retaining and describing them, are fully investigated and ascertained, and submitted to the consideration of the jury who have an opportunity of observing the manner and demeanour of the witness—circumstances which are often of as high importance as the answers themselves. It is not easy for a witness who is subjected to this test to impose upon the Court; for however artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended; the fraud is therefore open to detection by want of consistency between that which has been invented and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case, the imposition must obviously be very liable to detection; so difficult is it to invent extemporaneously, and with a rapidity equal to that with which a series of questions is proposed, in the face of a Court of justice and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the cause. "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement unless by special exception should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value.

In his examination-in-chief a witness discloses only a part of the necessary facts, not merely because the witness is frequently a partisan of the party calling him but also and chiefly because his evidence is given only by way of answers to specific questions, and the counsel producing him usually calls for nothing but the facts favourable to his party. If nothing more were done to unveil all the facts known to the witness, his testimony might present half truths only. Someone must probe for the possible and usual remainder. The best person to do this is the one most vitally interested, namely, the opponent. Cross-examination, then, has, for its first utility, the extraction of the remaining qualifying circumstances of the testimony given by the witness in his examination-in-chief. It not infrequently happens that a witness who is called by one party can give important information on other matters which go to support the other party's case. The party calling the witness will not naturally question the witness as to these matters, and, therefore, it is the duty of the other party's counsel to elicit these facts in the cross-examination of the witness. The other party can,

of course, prove these facts by calling other witnesses cognizant of them, but there is something dramatic in proving one's own case from the mouth of the witnesses of the opponent, and such opportunity should not be allowed to go unutilized. "The difference between getting the same fact from other witnesses and from cross-examination is the difference between slowburning sulphurous gunpowder and quickly flashing dynamite; each does its appointed work, but the one burns along the weakest line only, the other rends in all directions."

**In Criminal Trials:**—In criminal trials cross-examination may have the following objects:—“(1) To show that the witness did not see what he said he saw; as, that the witness, who said he saw the prisoner at a particular place, did not see him there; or, that the witness, who said he saw the prisoner coming from a particular place, was at the time of seeing him (as he said), unable, from the distance (220 yards) of the prisoner from him, to recognise the prisoner, to distinguish his features, to know him to be the prisoner; or, that the witness, who said, he saw the prisoner fire a pistol at another man, was, at the time of seeing him (as he said), unable from the distance of (220 yards) of the prisoner from him to recognise the prisoner. (2) To show that the witness did not hear what he said he heard; as, that the witness, who said he heard particular words spoken by the prisoner to a clamorous mob, was, at the time he heard the words, under some agitation of mind, was in a degree in a considerable fury of spirits; or that, at the time when the witness (as he said) heard certain words spoken by a man at the head of a mob, and addressed to the witness and others, the witness being nearest to the speaker, there was a good deal of noise and confusion, and that the witness was alarmed; and that considering the noise that prevailed at the time, and the witness's situation, and his alarm, the witness might not be able to swear positively to the precise words used. (3) To show that the witness spoke from hearsay; as, that the witness, who said a mob set fire to a chapel did not see them do it; that it was on fire when the witness first saw it, and who set it on fire he did not know; nor did he know that it was a chapel, only somebody told him so. (4) To test the truth of what the witness has said in general terms, by making him particularize as, when the witness has spoken in general terms of many persons, for instance, spoken in general terms of many persons who were present at a particular place, or of many persons who were forced to do a particular act against their will, to test the truth of the witness's evidence by asking him to tell the name of some persons, or the name of even one person present, or forced to do the act mentioned: or, when the witness has given evidence of words spoken by the prisoner to a large body of men, to test the truth of his evidence by asking the witness, whether he can name any person who was present when the prisoner spoke the words mentioned. (5) To show that the witness, who had identified a thing, had done so through mistake in the manner in which the identification had been put or left to him; as, where the witness had identified a great-coat as the great-coat worn by the prisoner on a particular occasion, and the witness in his cross-examination was asked, whether the great-coat was not produced to him as the great coat the prisoner had on; whether it was produced to the witness singly, or with any other great-coats. (6) To procure an explanation of words used by witness; as that the witness, who said the prisoner was at home on particular days, did not mean that the prisoner did not go out on those days, but only that he was at home some part of each of those days. (7) To show that the conduct of the prisoner was consistent with his innocence, was inconsistent with guilt, was open without

concealment ; as, that, with regard to papers, which the witness found and seized at the prisoner's house, during the whole time the witness was employed in searching for them there was not any end vouch made by the prisoner or any of his family, to conceal or secrete any of them ; or, that with regard to any acquaintance, which the witness said subsisted between the prisoner and himself, the witness was not in confidence with the prisoner ; and with regard to a conversation which the witness said the prisoner introduced to him, the prisoner imposed no confidence on him, and acquainted him that he had mentioned the matter of the conversation to some other persons, and intended to mention it to more ; or, that with regard to a matter which the witness said the prisoner communicated to him on the prisoner's accidentally meeting and stopping him in the street, the prisoner communicated it to him in the open street, and not with any secrecy ; or, that the prisoner who went on board a ship at Portsmouth about a week before it sailed, and who, on the part of the prosecution it was alleged, went on board to fly from the accusation against him, did when on board pass by his own name, and at Portsmouth came on shore several times, and went publicly about the streets ; or, that at the time the prisoner was in custody, no man could act with more openness in all his conduct than did the prisoner ; that on his examination before the Magistrate at L he was discharged on his own recognizance ; that after he was charged he remained at L, for nine days until he was again taken into custody ; and the witness, clerk to the Magistrate at L, knew where the prisoner was the whole of that time, and frequently saw him. (8) To cause the witness to repeat something which, on his examination-in-chief, he has said favourable to the prisoner ; as, that he could not identify the prisoner as being one among a body of men or as the man, who had used certain words ; or that, although the prisoner was present when certain words were used, he was not near enough to hear them. (9) To show that the evidence now given by the witness contains some addition to, or contradiction of, or otherwise differs from, his evidence, statement or story given, made or told on some previous occasion."

Many are the just objects of a cross-examination according to the circumstances of the case in which it is used, its only design being to elicit truth. But the legitimate end of a cross-examination is sometimes perverted to serve a bad purpose,—to alarm, mislead, or bewilder an honest witness, when the effect may be to hide rather than to bring out truth.

It is plain that for the purpose of an effective cross-examination, the cross-examining party must be in possession of some information, suspicion, or other matter on which to found it. This he will use as a clue to the further evidence desired. Without this guide, the cross-examiner will wander in the dark, and, except by mere accident will not arrive at any evidence of the smallest importance. The information, suspicion, or other matter, forming the ground of a cross-examination, may be possessed quite independently of the examination-in-chief ; or it may be guided in the course of the examination-in-chief or cross-examination. And consequently it is not necessary, that a clue, or all the clues, by which to cross-examine, should be in hand at the commencement of the examination-in-chief or cross-examination ; they may be picked up in the midst of either.

In a cross-examination, the party examining makes use of the witness as, for this purpose, his own witness, as a witness on his own side. And he has a hope and desire, that the evidence in the cross-examination will so contradict, vary, explain or otherwise affect the evidence in chief, that the result of the whole

## OBJECT AND IMPORTANCE OF CROSS-EXAMINATION

or at least part, of the evidence on the two examinations combined will be favourable to his own side. A cross-examination intended to destroy, or, at least weaken the evidence given in the examination-in-chief, very often ends in confirming or strengthening it. The knowledge of this frequent result of cross-examination was probably the ground of Lord Eldon's observation on interrogating a prosecutor—"He was wont to say, jocularly that he had been most effective advocate for prisoner; for that he had seldom put a question to a prosecutor."

Equal caution was used by O'Connell in cross-examining witnesses for a prosecution :—"There is one, the most difficult, it is said, and certainly the most anxious and responsible part of an advocate's duties, in which O'Connell is without a rival at the Irish bar—I allude to his skill in conducting defenses in the Crown Court. Though habitually so bold and sanguine, he is here a model of forethought and undeviating caution. In his most rapid cross-examinations, he never puts a dangerous question. He presses a witness upon collateral facts, and beats him down by argument and jokes and vociferation; but wisely presuming his client to be guilty until he has the good luck to escape conviction he never affords the witness an opportunity of repeating his original narrative, and perhaps by supplying an omitted item, of sealing the doom of the accused."

### There are three objects of Cross-examination

"1. *To destroy or weaken the force of his testimony in favour of the other side.* If this be your design, you can attain it only by one of two processes. You must show from the witness's own lips, either that what he has stated is false, or that it is capable of explanation.

"If your opinion be that he is honest but prejudiced; that he is mistaken; that he has formed a too hasty judgment, and so forth, your bearing towards him cannot be too gentle, kind and conciliatory. Approach him with a smile, encourage him with a cheering word, assure him that you are satisfied that he intends to tell the truth and the whole truth, and having thus won his good will and confidence, proceed slowly, quietly, and in a tone as conversational as possible to your object.

"And here, at the very outset, let us warn you against exhibiting any kind of emotion during cross-examination; especially to avoid the slightest show of exultation when the witness answers to your sagacious touch, and reveals what apparently he intended to conceal. It startles him into self-command, and closes the portal of his mind against you more closely than ever. "You have put him upon his guard and defeated your self. Let the most important answer appear to be received as calmly and unconsciously as if it were the most trivial of gossip.

"If you suspect that some of the statements of the witness are false in fact although not wilfully misstated—errors of the senses, of the imagination, of the memory so much more frequent than they whose occupation has not been to sift and weigh the worth of evidence might suppose your task becomes a very difficult one, for without in any manner charging him with perjury, or desiring to have it understood that you do otherwise than believe him to be an honest witness, you have to prevail upon him to confess that which will wear the aspect of falsehood. Now there is nothing upon which witnesses of every grade of rank and intellect are so sensitive as self-contradiction. They suspect your purpose instantly, and the dread of being made to appear as lying, while often producing contradiction and evasion, more often arms the resolution of the witness to adhere to his original statement, without qualification or explanation. When, therefore,

it is your purpose to show from the witness's own lips that he was mistaken, the extremest caution is required in approaching him. You must wear an open brow, and assume a kindly tone. Let there be in your language no sound of suspicion. Intimate to him delicately your confidence that he is desirous of telling the truth, and the whole truth. Be careful not to frighten him by point-blank questions going at once to involve him in a contradiction, or he will see your design, and thwart it by a resolute adhesion to his first assertion. You must approach the object under cover, opening with some questions that relate to other matter, and then gradually coming round to the desired point, and even when you have neared the desired point, you must endeavour, by every device your ingenuity can suggest, to avoid the direct question, the answer to which necessarily and obviously involves the contradiction. The safer and surer course is to bring out the discrepancy by inference, that is, instead of seeking to make the witness unsay what he has said, it should be your aim to elicit a statement which may be shown by argument to be inconsistent with the former statement."

2. "The second object of cross-examination is to elicit something in your favour. The method of doing this depends upon the character of the witness. If you believe him to be honest and truthful, you may proceed directly to the subject-matter of your inquiry, with plain point-blank questions. But if you suspect that he will not readily state what he is aware will operate in your favour, you must approach him with some of the precautions requisite for the cross-examination of a witness who is not altogether trustworthy.

"The most cautious cross-examination will not always prevent the disagreeable incident of an answer that tells strongly against the questioner. When such a contretemps occurs to you, do not appear to be taken by surprise. Let neither countenance, nor tone of voice, nor expression of annoyance, show you are conscious of being taken aback. If other exhibit surprise, be you as calm and appear as satisfied as if you had expected the answer in question. Thus you will repel the force of the blow, for, seeing that you are not preplexed by it, the audience may suppose it not to be so important as they deemed it to be, or they give you credit for some profounder purpose than is apparent, or that you are prepared with a contradiction or an explanation. Sometimes, indeed, where the blow has been more than usually staggering, it may not be bad policy to weaken its force by openly making light of it, repeating it, taking a note of it, or appending a joke to it. At no time is self-command more requisite to an advocate than at such a moment, and never is the contrast between experience and inexperience, the prudent and the injudicious, more palpably exhibited.

3. "The third object of cross-examination is to discredit the witness. (See Chap. 49 *infra*). See Cox's Advocate.

Cross-examination is a direct and natural result of the reception of oral evidence in trials in courts. Where such evidence is defective, cross-examination supplements it; where it is inaccurate, cross-examination rectifies it and where it is false the cross-examination attempts to expose it. This will be clear from the following illustration.

### Illustrations

(i) In theft case.—A man was charged with burglary. Here are the facts presented by the witnesses: "A man was seen coming from the back door of a

place in Toronto, late at night, within the burglarising hours : his identification, there was not much of question about that ; his manner and conduct were such as to cause comment by the officers who took him in charge ; he was evidently in great haste to escape from the house ; he was arrested, unable to give any satisfactory account of himself at the moment and some tool or other was found in the coat pocket and the man was arrested charged with burglary—the case of the Crown apparently absolutely complete. Now that man might have been convicted and might have served his term— a perfectly plain case ; but it developed in the cross-examination of certain witnesses for the Crown and upon the evidence which was given for the defence that this was what happened :—That this man was a friend of the servant of the house ; that he had been there spending the evening and by some accident or another he had left the door open ; that he was a man of very excitable temperament and that he had, just before leaving, a row with this servant ; he was running to catch a car because it was late at night and he had to catch one before a certain time ; that he was a mechanic, and he had a certain implement, a wrench or something of that kind, in his pocket at the time of his arrest. In the witness-box the witnesses swore to damaging evidence and the outward facts seemed to be perfectly honest but they were at the wrong angle ; the witnesses had received these impressions through a wrong perspective and the result of it was that if it had not been for the righting of the evidence in that way or in some other way, the man should have been convicted.” 20 M. L. J. 281. This illustrates the well-known saying of Habburton, “Hear one side and you will be in the dark, hear both sides, and all will be clear.”

(ii) In poisoning case.

Q. ‘Did you weigh it with the same shot ? A. ‘I weighed it with shot of the same number, for I had no other number.

Q. ‘How much less did it weigh A. ‘Twenty four grains less.’

“It was plain that this testimony bore hard upon the prisoner, but at this stage of the case the Court adjourned. Immediately my colleague (Mr. Boyd) and myself visited the stores of all the grocers, and took from various uncut bags of No. 8, the requisite number of shot, subjected them to weight in the most accurate scales, and found that the same number of these different parcels of shot varied more in weight than the difference referred to as detected in the arsenic at the time of its return. The shot, the grocer, the apothecary, the scales were all brought before the Court. They clearly established the facts, stated and enabled us fairly to contend that there had been no portion of the arsenic used, which argument, aided by the excellent character of the prisoner, proved entirely successful, and after a painful and prolonged trial she was acquitted, so that her life may be said to have been saved by a shot.” Wigmore, S. 1868.

(iii) A stands complacently in the witness box and under the kindly direction of a friendly counsel and tells the Court easily and confidently that he saw an indecent assault being committed on a woman. He gives a vivid description of the brutal force used by the accused and of the pitiful cries emanating from the victim. He concludes his evidence by giving the impression that the accused was a perfect rake and a slur on the society. The examination in chief is finished and he is turned over to the defence counsel for cross-examination.

The counsel advances menacingly on the witness and fixes him with searching eyes and incriminating glare. The complacency displayed by A vanishes. A sort of cold sweat breaks out on his brow. His lips are parched and there is a lump in his throat. The court also begins to observe him more keenly. The witness glances helplessly towards his lawyer for encouragement and



guidance. The counsel has seated himself in his chair leisurely and quite indifferently and is found absorbed in his bundle of notes prepared for the case. The cross-examiner asks him about the means of his livelihood to which he cannot give any satisfactory answer. Again he is reminded that every month he gives evidence for the police at least in half a dozen cases to which he nods his assent. It is ultimately found from his evidence that he joins the police investigation almost everyday and is thus a stock witness of the police. He is in short a witness by profession. When to his utter dismay he is told that his evidence had been disbelieved in dozens of other cases and disparaging remarks have been made against him by several courts, his countenance changes. Unconsciously the witness imagines that all the dirty linen of his past life is mercilessly going to be exhibited to the court and to a court room crowded with morbid sensation seekers. The witness's trouble has begun. The distress of this particular witness or any other witness may be accounted for by the fact that a layman is a stranger in a court of law and is not conversant with the procedure adopted during the trial of a case. Many an accused would have gone to gullows or jail if the evidence of a witness had not been subjected to cross-examination. The true object of cross-examination is to find out which side is most probably right in its contentions and to impeach the credit of false witnesses. The ultimate goal is to find out the truth. It must not be understood that cross-examination is a cheap vehicle for obtaining sensational publicity for lawyers nor is it a legal cudgel for brow-beating and bullying a timid witness. But it is an essential piece of legal apparatus which is most useful in proving hard facts in a court of law. It cannot be gainsaid that cross-examination provides a dramatic entertainment to the public visiting the court room and thrilling sensation is produced very often, but as a matter of fact it is in rare cases that a counsel is allowed to play to gallery. Besides the dramatic super-structure cross-examination is important for laying the foundation of certain facts which contributes to the useful termination of a case. It is not necessary that cross-examiner should confine himself to the facts narrated in examination-in-chief. He has to test the veracity of the witness by questions appertaining to the surrounding circumstances. For example, if a witness deposes that he saw the occurrence at a time of the year when oranges were ripe it can be shown by the defence that in that particular month oranges are not ripe at all and that the witness is lying. It must be remembered that every cross-examination cannot produce spectacular results. There are a number of witnesses who stick to perjury adamantly and cannot be confused or confounded by the cross-examiner. Often it so happens that cross-examination raises a sort of suspicion as to the veracity of a witness but in very few cases it succeeds in breaking him down completely.

(ix) A curious case occurred recently of a Broadway actor who ordered *Kidney sante en casserole* in a Hotel in New York. His case was that while eating he discovered half a mouse in his plate. The Jury returned a verdict of a dozen dollars in his favour. During the trial it was brought out in his cross-examination that he was seeking a movie contract at the time of the incident and that he was anxious to get publicity. This raised the suspicion that he had brought the offending mouse into the dining room himself and planted it there to create a new story with the object of bringing his name to the notice of some movie magnates. The decision of the court was affirmed by the New York Court of Appeal. The story of the actor that the mouse had been cooked with the kidneys was accepted. Here although a skilful cross-examination was enough to raise a suspicion as to the veracity of a witness, the main effect of the story was unshaken.

Detection of falsehood in human testimony is the main object of cross-examination. It will not be out of place to mention some of the chief causes of falsehood appearing in evidence adduced in a Court of law,

**Causes of Falsehood in Human Testimony.**—1. Human testimony taken at its very best is by no means infallible. A man may be perfectly honest, and in his own mind quite certain what he says is correct, but he reckons without taking into account his own unconscious prejudices, his liability to mistake, and the possible failure of memory, even assuming the particular incident did indeed make memory-producing impression on his brain. A man's religious views, his political prejudices his pessimism or optimism, his relation to one of the actors in the drama he is asked to relate, his age, his occupation, and a variety of other matters all affect his impressions and his memory, and necessarily colour his account. 4 M. L. T., 11 (Notes). A man gazing at an object, through green glasses necessarily finds it coloured green; and so eyes governed by a mind clouded with strong religious, social or political ideas, record in the memory a necessarily coloured account. 4 M. L. T. 11 (Notes).

2. Falsehood in human testimony arises out of several causes. It may be due to want of capacity to observe correctly, or want of powers of proper recollection or want of powers of proper narration, sometimes it is due to the want of willingness to speak the truth. Intentional and wilful falsehood is far less common than it is often supposed. Most often falsehood arises unconsciously, without the witness knowing that he is not speaking the truth. The enunciation of truth and abstinence from wilful falsehood among men in their intercourse with one another are secured by three guarantees or sanctions, viz., the natural sanction, the moral sanction and the religious sanction. 1 Bentham Jud. Ev. 198. (1) The natural sanction is altogether physical in its character arising out of the love of ease—memory being prompter than invention. The false facts for which imagination is drawn upon, are not to be got at without effort, not only so, but if in the search made after them, any at all present themselves, different ones will present themselves for the same place, to the labour of investigation is thus added the labour of selection. (2) The moral sanction is that men having found the advantage of truth have by general consent affixed a brand of disgrace on a voluntary departure from it. A great infirmity of the moral sanction is that it derives its force from the value men set on the opinion of others. It naturally teaches them to conceal that from public view even at the sacrifice of truth. (3) Lastly there is a religious sanction, which is founded on the belief that truth is acceptable and falsehood abhorrent to the Governor of the universe, who will in some way reward the one and punish the other. The divine punishment for falsehood however being prospective and invisible, the weight of this sanction is not so great as it would otherwise be. A perjury is often committed by persons whose religious faith cannot be doubted and who presumptuously hope either by their subsequent good conduct or some other means to efface its guilt in the eyes of Heaven. Very few people realize that Mills of Heaven although move slowly, grind surely.

The effect of these three sanctions is much greater than might at first sight be supposed. They are in continual operation as efficient causes for the production of truth and rendering its enunciation natural and habitual to men while every incentive to falsehood can only be looked upon as a species of destroying force which acts occasionally and exceptionally. The quantity of truth daily spoken immeasurably exceeds that of falsehood and from the mouth of the most egregious liar that ever existed, truth must have issued a hundred times for once that wilful falsehood has taken place. Bentham Jud. Ev. 82, Best VIII Ed. pp. 7 & 11.

### Human Testimony is defective.

“Our belief as to the existence or non-existence of a fact has its source, or efficient cause, either in the operation of our own perceptive or intellectual

faculties or in the operation of the like faculties on the part of others evidenced to us either by discourse or deportment." *Principles of Law of Evidence* by Best 5th ed. p. 7.

The existence of a strong tendency in the human mind to accept as true what has been related by others is universally admitted, and is confirmed by many facts of observation; and it may be laid down as equally certain, that one cause of this tendency is our experience of the great preponderance of truth over falsehood, in human testimony taken as a whole. Man is so constituted that the knowledge which he can acquire through his personal experience is necessarily very limited, and, unless by some effective provision of nature he were enabled and indeed compelled to avail himself of the knowledge and experience of others, the world could neither be governed nor improved. The distinctive character of the tendency in question appears from the undoubted fact that it is immeasurably strongest in childhood and diminishes when experience has made us acquainted with falsehood and deception.

### Illustration.

In an arson case, O'Connell who was a typical Irish bullying cross-examiner, could not break the testimony of a facile liar. When his bullying failed, he resorted to a crafty trick to gain a point in the cross-examination. The Crown proved that the incendiary fire in Police Barracks had been started by the use of pitch, that is, tar. A witness for the prosecution gave evidence to the effect that he had discovered the fire and had recognised the odour of the pitch. O'Connell tackled this witness in cross-examination in the following manner:

Q. You know the smell of pitch, then? A. I do, well.

Q. You seem a man able to smell pitch anywhere? A. Anywhere I found it.

Q. Even here, in this court house, if it was here? A. No doubt I would.

Q. And do you swear that you don't get the smell of pitch here? A. I do solemnly. If it was here, I'd smell it.

With a sneer such as only O'Connell was capable of, he reached down to the foot of the stand and lifted his top hat away from the floor. There, underneath, it was revealed a large skillet of steaming pitch which he had previously thrown.

Q. Step down you perjured rascal.

The witness left the stand charred.

**Evidence must be in conformity with Physical laws.**—"Evidence to be believed," said Vice-Chancellor Van Fleet of New Jersey, "must not only proceed from the mouth of a credible witness, but it must be credible in itself, such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous, and is outside of judicial cogitation."

Some people have false notion that the court would believe in any story, simply because a number of witnesses give evidence about it. Unless the facts or events about which evidence is given are such that the judge would deem it likely to have happened or at least within the sphere of possibility, it is useless to expect him to give his belief illustration; "If we considered witchcraft

probable, a hundredth part of the evidence we possess would have placed it beyond the region of doubt. If it were a natural but a very improbable fact our reluctance to believe it would have been completely stifled by the multiplicity of proofs." But according to the prevailing and accepted notions of the present day there can be nothing like witchcraft. Consequently, no amount of evidence as to its existence would induce a judge to give a finding that any evil effect has been produced by the practice of it by any individual.

The following is summing up by judge to a jury in an American case: "Suppose that a small child should tell you that he saw a large wolf run away with an unusually small lamb. As against this, ten adults testified that this was not the case at all, but that the real fact was that this very small lamb was actually running away with the large wolf. It would not take a jury very long to determine where the truth lies, notwithstanding ten against one."

"Courts are not so deaf to the voice of nature, or so blind to the law of physics, that every utterance of a witness in derogation of those laws will be treated as testimony of probative value simply because of its utterance. A court will treat that as unsaid by a witness which, in the very nature of things, could not be as said. When one says he looked and did not see an object which if he had looked, he, in the nature of things, must have seen, he cannot be credited if he says he did not see the object. Hence, testimony of a person possessing normal faculties of sight and hearing that he looked and listened for an approaching train at a railroad crossing and did not see or hear a train rushing towards him in plain view is "incredible as matter of law," "against the mathematics of his environment," and "must be rejected as not in accordance with the truth of the matter, even though uncontradicted by the direct testimony of any other witness."

"Should a person affirm that black was white or white was black, or being in the full possession of his faculties, and having the unrestricted use of his limbs, should testify that he actually and necessarily occupied a year in walking a mile, his statements would be so in conflict with recognized possibilities as to be entitled to no credit or character as evidence." In the matter of Harriet, 145 N. Y. 540.

When a genuine signature of a person, held up to a windowpane and superposed over another alleged signature of the same person, is such a resemblance that the one is a perfect match to the other in every respect, it would be absurd to contend that both signatures are genuine. The probabilities against such a coincidence in genuine signatures mathematically computed or represented by a number which is scarcely conceivable. Moore on Facts Vol. I p. 209, 605.

It was claimed that a woman entering a street car, and facing forward in the direction the car was about to proceed, was thrown violently forward on to her knees by the sudden starting of the car, and then thrown backwards on to her back by the sudden stopping of the car. The court was unable to see how she could fall twice in "apparent violation of well-known and established physical laws." *Ibid.*, p. 194.

"It is in the face of reason to say that a hook that had held up from five thousand to seven thousand pounds and had not been used since, would give way under a weight of 4,300, and the uncorroborated assertion of a witness to that effect might with propriety be rejected by a jury." (1907) 101 S. W. Rep. 6 & 14.

But an improbable fact properly verified is not to be rejected because of such improbability? We know that there are happenings exceedingly strange and apparently against all our pre-conceived ideas of their possibility." "It is

true, in human experience, that almost all things are possible." "The improbable, however, is not always the untrue." "The most improbable things are sometimes true, and the most probable things sometimes don't happen." "That the improbable and unlooked-for do sometimes occur, in common experience." "The unlikely often happens." "Human experience teaches that the unexpected and unthought-of often happens." "The unexpected always happens" is a common proverb, and "the things which are impossible with men are possible with God" is an utterance of one possessed of greater than human wisdom. It is said that when Joseph's brethren returned to their father and told him Joseph was yet alive and governor over all the land of Egypt, Jacob's heart fainted, for he believed them not." Witnesses of unimpeached credit are not to be subjected to an imputation of perjury upon the mere improbability of their testimony. Judge Whelpley of the New Jersey Supreme Court said that "witnesses should not be convicted of perjury by showing that their testimony is in a high degree improbable."

"Science has not yet drawn, and probably never will draw, a continuous and permanent line between the possible and impossible, the knowable and unknowable. Such line may appear to be drawn in one decade, but it is removed in the next and encroaches on what was the domain of the impossible and unknowable. Advance in the use of electricity and experiments in telepathy hypnotism and clairvoyance warn us against dogmatism." It was said by Judge Johnson of the American Court of Appeals: So frequently do unlooked-for results attend the meeting of interacting forces, that courts in such cases, should not indulge in arbitrary deductions from physical law and fact, except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other.

Again there seem to be several things that appear to be perfectly possible from the practical and scientific of view, in the existence of which it would be absolutely hard to make an ordinary layman believe. To take one out of several instances, if a witness were to state that, to his knowledge, a particular person slept for several years, days or months together, at one stretch an ordinary judge or jury would, in the first instance consider it as nothing more than a myth; false; and yet, it would appear, that such things are absolutely possible, and extraordinarily long sleeps have occurred in several recorded cases. The following, extract from the *Hindu* of 19th February 1918, shows some of the cases of such long continuing slumbers—slumbers that lasted for several months and even years.

"Recently a young French soldier who was wounded at the beginning of the war woke up after a nap of over two years. During the whole of that period food was artificially administered, and he is just as strong in body and mind as he was before his unique experience."

A number of similar instances are also recorded in previous writings. Sometime ago a woman in Brussels was aroused by church bells ringing in consequence of a fire. She had been asleep for nearly seventeen years. When she awoke she was in perfect health. The case was one of those that had taken place seventeen years ago.

There have been several instances of sleeps lasting twenty years. Here is the remarkable case of the "Darmouse of Menelles"

In 1883 Margaret Bangerel, a pretty girl of twenty-one years of age, became unconscious as the result of a practical joke played upon her. The trance

lasted for twenty years, and she became the most talked of woman in Europe. Medical celebrities from all parts of the world flocked to see her, but failed to diagnose the case or bring about any successful remedy. She was never aroused from her comatose state, for she died in 1903.

A case in which the sleeper regained normal health is that reported from Minnesota, where a German sometime ago completed a sleep which, with the exception of one solitary week, continued for twenty-three years. He went to sleep quite naturally one night, but the following morning remained in bed and, from that time for over a score of years, he scarcely ever awoke of his own accord. He used to be roused once a day in order to take a little milk, which was poured down his throat. This was his sole food. Immediately this was done he fell fast asleep again.

Doctors utterly failed to arouse him, and not even electric shocks would awaken him. Ultimately he awoke of his own accord, and soon regained his lost strength.

One of the most remarkable naps on record is that of Caroline Oilson, a native of the little island of Okuo, off the coast of Sweden, who fell asleep in 1875 and did not wake until 1907.

For the first fourteen years of her life Caroline Oilson was in perfect health. Then she fell ill and ultimately sank into a trance from which no one could awaken her. Food was artificially administered, and for years she exhibited no interest in any one or anything. Then suddenly she awoke, and the most careful examination failed to reveal the slightest weakness or mental defect. Since then she has enjoyed exceptionally good health.

For five months a girl, aged eighteen, whose home is at Milkwood Road, Herne Hill, London, has lain asleep at King's College Hospital, Denmark Hill, London, to the bewilderment of the doctors. She was admitted after a severe attack of mumps, being then in a comatose condition, and all attempts to rouse her proved unavailing. The doctors are not without hope of her ultimate recovery, for she is of strong physique and has not lost weight during her long sleep. See *Hindu* of 19th February 1918.

In such cases what the advocate has to do is to raise the level of the juryman's understanding, to make him believe in the possibility of things that might not have come within his limited experience, to make him realize the truth of what Shakespeare wrote, that "there are more things in heaven and earth than are dreamt of in our philosophy."

### Convincing Witness about fallacy.

Another object of cross-examination is to bring home to the person that his view or position on a particular subject is fallacious or perverse. It can be well illustrated from the Platonic dialogues which are as old as the day of Socrates.

**Illustration.**—In this instance Socrates attempts to bring to reason a boy named Lysis who complained that he was not allowed to take part in the politics of the Athenian State and that the people did not like his meddling in the affairs of the nation. The conversation proceeded as follows:—

Q. Socrates asked Lysis (the boy):—'Your father and mother love you very much, do they not?' A. 'Very much?'

Q. 'And they wish you to be very happy, do they not?' A. 'Certainly'.

Q. 'Do you think that a person is happy who is kept in slavery and is not allowed to do anything that he would like?' A. 'Truly, no.'

Q. 'And if your father and mother love you and desire that you should be happy, do they try every way to make you happy?' A. 'Certainly'.

Q. 'Then do they let you do what you like, and never scold you, never prevent your doing what you like?' A. 'Oh indeed, Socrates, they prevent my doing a great many things.'

Q. 'How do you say? Though they wish you to be happy, do they prevent you doing what you like? Now, just tell me. If you wanted to get into one of your father's chariots, and drive it, holding the reins yourself, when he has to run a race, would they permit you or prevent you?' A. 'They would not permit me.'

Q. 'Then, whom would they permit?' A. 'My father has a charioteer to whom he pays wages.'

Q. 'How do you say? Do they let a hired servant do what he likes with the horses rather than you, and give him money besides?' A. 'To be sure they do.'

Q. 'But the mule team, they permit you to drive that; and if you liked to flog them they would let you.' A. 'Would they let me?'

Q. 'What, is nobody allowed to flog them?' A. 'O yes, the muleteer.'

Q. 'Is he a slave or freeman?' A. 'A slave.'

Q. 'And so, it seems, they hold a slave to be better than you, their son, and entrust their things to him rather than to you, and permit him to do what he likes, and prevent you. Tell me one thing more. Do they let you manage yourself, or do they not even entrust you with so much?' A. 'How do they entrust me with that?'

Q. 'Why' who manages you?' A. 'This walking companion, my Tutor.'

Q. 'And is he a slave?' A. 'Yes, he is our slave.'

Q. 'What a sad thing, that a free person should be under the control of a slave! And in what way does this Tutor control you?' A. 'He brings me to the school.'

Q. 'And the school-masters, do they control you?' A. 'Completely.'

Q. 'Well; your father seems bent upon giving you a great number of masters and governors. But when you go home to your mother, does she let you do what you like, to make you happy, and let you meddle with her wool and her work? Of course she lets you take hold of her shuttle and her other implements that she works with?' A. 'Indeed, Socrates, not only does she prevent me, but she would beat me if I touched any of those things.'

Q. 'Bless me, have you offended your father and mother?' A. 'No indeed.'

Q. 'Then why do they constrain you so sadly, and prevent your being happy and doing what you like, and keep you all day long always in subjection to one person or another; and never let you do anything that you wish to do? So that, it seems, you are never the better for being of a wealthy family. Every-body is allowed to use this wealth more than you; and you are none the better

for your person, which is so handsome, but even this is managed and governed by another; and you are not allowed to manage anything, nor to do anything which you wish to do.' A. 'It is because I am not of age, Socrates.'

Q. 'Do not make any difficulty of that, son of Demophon; for as to that, your father and mother commit some things to you, and do not wait till you are of age. When they want a person to read to them or write for them, they set you to do it rather than any other person in the house, do they not?' A. 'Certainly.'

Q. 'And then you may write and read as you like, putting one letter first and another second, according to your own judgment. And when you play the lyre, your father and your mother do not prevent you tightening one string and slackening another and fingering them and pinching them as you think best; do they?' A. 'No, certainly.'

Q. Then what is the reason that in these things they do not prevent your acting, but do prevent it in the other cases of which we spoke?' A. 'I suppose because I know these things, but not the others.'

Q. 'Very well then, my good friend, so then your father does not wait for your being of age, in order to give you leave to act. On the very first day that he thinks you are wiser than he is, he will commit to your management all that he has, and himself into the bargain.' A. 'I think so too.'

Q. 'Well, but will not the same rule hold with your neighbour as with your father? Do you not think that he too would give you the management of his house when he thinks that you understand the management of a house better than he does?' A. 'I suppose he would.'

Q. 'And do you think that the Athenians will give you the management of their affairs when they think that you are wise enough to manage them?' A. 'I think so.'

Q. 'Truly and about the great king of Persia? Whether do you think he would trust his eldest son who is the heir of all Asia, or us, to season his roast meat for him, if we were to go to him and let him see that we understand seasoning better than his son?' A. 'Us, plainly.'

Q. 'And he would not let him put a pinch of salt on the meat, and would let us pepper and salt it at our discretion.' A. 'Of course.'

Q. 'And if his son had a disorder in his eyes, would he let him handle his own eyes, knowing nothing of surgery, or would he prevent him?' A. 'He would prevent him.'

Q. 'But if he understood us to be good oculists, he would let us handle them, and even pull them open and stuff them with ashes, and would suppose we knew what we were about.' A. 'You say truly.'

Q. 'And would he let us manage everything rather than do it himself or commit it to his son,—everything in which he supposed us to be wiser than they?' A. 'He could not help it.'

Q. 'And so you see, my dear Lysis, that things which we understand, everybody will allow us to manage, whether Greeks or barbarians, men or women: and with regard to such matters we may do what we please, and no one thinks of binding us. In such matters we are free to act and we even have command over others, and the things are ours, and we have the good of them. But as to things which we do not understand, nobody will let us do what we like



with them ; and not only strangers, but even father and mother and the nearest friends. In such matters we must be subject to others, and the things do not belong to us, and we get no good of them. Can we be friends to any one, and make any one love us by meddling with things in which we can be of no use ?  
A. 'No, certainly.'

Q. 'No ; neither his father nor any one loves a person with regard to things in which he is useless.' A. 'So it seems.'

'Then if you come to be a wise man, my boy, all will be friends to you, all will care for you. For you will be useful and good. But if not, not even your father, nor your mother, nor your relations will care for you. How then can anybody think great things of himself when he does not know how to think wise things ?\*

**Impeaching Credit of the Witness.**—Another object of cross-examination is to bring out facts which go to diminish or impeach the trustworthiness or credit of the witness. Some of these facts can be obtained only from the witness himself, particularly those which concern his personal conduct and his sources of knowledge for the case in hand. *See Wigmore* s. 1368. *See also* 1928 C. 769.

Indian Evidence Act lays down the manner in which credit of witness may be impeached. *See* Ss. 146—155, Ev. Act.

As to the full discussion on the point see separate chapter 59 and *Prem's Criminal Practice* 1840—1947.

### Importance of Cross-examination

The subject of cross-examination is one of great importance in the conduct of law cases, important because it deals with the separation of truth from falsehood, important because it enables the Court to be seized of all the circumstances of the case bearing upon the issue which the judge or jury may be called upon to try. Then another peculiar phase of it is that it deals largely with the undisclosed. The evidence-in-chief, it is well-known is briefed ; the evidence of the cross-examination is briefed only in the mind of the cross-examiner. Cross-examination properly conducted becomes important in another way. It expresses bias, detects falsehood and shows the mental and moral condition of the witnesses and whether a witness is actuated by proper motive or whether he is actuated by enmity towards his adversary. But perhaps one of the most important bearings it has is that it either corroborates your own client's version of the issue or it weakens your adversary and here it may be said is one of the cardinal elements of cross-examination. Unless you corroborate your client by your cross-examination the chances are very largely that you strengthen the hands of the adversary. Indeed it presents, if properly carried out, the case in an entirely new light. You hear the evidence-in-chief passing away without any cross-examination that is one case but when you hear a cross-examination of witnesses the case presents a totally different aspect and may be so developed that it comes to be in favour of your client instead of being in favour of the person on whose behalf it was given. 11 Cr. L. J. 73 (Eng.)

Cross-examination is commonly esteemed the severest test of an advocate's skill and perhaps it demands beyond any other of his duties the exercise of his ingenuity. There is a great difficulty in conducting cross-examination

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\* *See Whewell's Platonic Dialogues*, Vol. I, 2nd Ed., 1890, pp. 83—87.

with creditable skill. It is undoubtedly a great intellectual effort: it is the direct conflict of mind with mind; it demands not merely much knowledge of the human mind, its faculties, and their *modus operandi* to be learned only by reading, reflection and observation but much experience of man and his motives derived from intercourse with various classes and many persons and above all by that practical experience in the art of dealing with witnesses which is worth more than all other knowledge which other knowledge will materially assist but without which no amount of study will suffice to accomplish an advocate.

“To the onlooker cross-examination has much more interest, for it is more in the nature of a combat, with excitement that always attends a combat of any kind—physical or intellectual—man against man, mind wrestling with mind, whereas in examination-in-chief, the advocate and his witness have the appearance, at least of being allies, and whatever skill of the former is required to exercise for the attainment of his object needs to be concealed, and is seldom apparent to a mere spectator, however, it may be recognised and appreciated by those who are engaged with him in the cause, and who know with what exquisite tact he has elicited just what he desired and suppressed that which he wanted not to reveal. See Wrottesley on Examination of Witnesses, p. 105, and Cox's Advocate.

### Common-sense in Cross-examination

Cross-examination cannot be learned; there is no royal road to the successful cross-examiner. There is no means by which the cross-examiner may become perfect in his art. Experience does a great deal. Observation, perhaps, does more. Knowledge of human nature is perhaps greater than the other two combined but there is no way in which any man at the Bar can sit down and study out cross-examination as a science in the same way as he can study the law or the legislation of his country from scientific standpoint. It has been said that to a great extent cross-examination is intuitive just as music is, just as painting may not be very successful for it requires training, practice and experience and by and by he develops into a great musician or a great artist but in order to do that he must have the intuitive genius, and the faculty for that which he is doing, otherwise he will always remain an unaccomplished musician or a mediocre artist. Even genius sometimes will not be developed along the line of study or through education. Education itself requires a vast amount of experience to make it effective in the hands of the cross-examiner. Then it becomes more difficult by reason of this that there must be a very delicate, sensitive and very extensive knowledge of human nature. There must be in addition to that a very extensive knowledge of the ordinary business and personal affairs of human life, because it is by this alone that we reach the motives and passions and the methods of the witnesses. 11 Cr. L. J., 73.

The rules of reasoning and proof which are applied in our Courts of Justice are, speaking generally, the rules of ordinary logic and common sense. The law possesses no special and peculiar logical apparatus; but, for practical reasons having regard to the conditions under which trials and especially trials by jury are conducted certain special rules have been made not merely as regulations of procedure but by way of limitation to the ordinary logical rules of proof in order to keep legal proceedings within practical limits, to prevent the attention of juries from being carried away to matter which are unimportant or only remotely relevant, to keep

their minds from being improperly influenced by matters of prejudice, and especially in criminal case; to prevent mistaken verdicts, which must cause irreparable injustice. 11 Cr. L. J., p. 21.

### Illustrations.

One of the necessary qualifications of an advocate is that he must be able to draw out vividly the picture of the occurrence with all its minute details as it happened at the time and place in question. The following story is told of a shrewd Faqir who was questioned by a merchant whose camel had gone astray. The Darvesh after making a few inquiries from the merchant, told him that there was a camel going in a particular direction which was blind in his right eye and lame in his left leg and had lost a front tooth. He further informed him that he was loaded with honey on one side and the wheat on the other. The Faqir was asked to conduct the merchant to the place where the camel was. "My friend" said the Faqir "I have never seen your camel nor even heard of him, but from you." On this the merchant took the Faqir to the King and lodged a complaint against him. The Faqir in order to prove his innocence addressed the Court thus:— "I have been much amused with your surprise and own that there has been some ground for your suspicions; but I have lived long and alone; and I can find ample scope for observation even in a desert. I knew that I had crossed the track of a camel that had strayed from its owner, because I saw no mark of any human footstep on the same route; I knew that the animal was blind in one eye, because it had cropped the herbage only on one side of its path; and I perceived that it was lame in one leg, from the faint impression which that particular foot had produced upon the sand; I concluded that the animal had lost one tooth, because, wherever it had grazed a small tuft of herbage had been left uninjured in the centre of its bite. As to that which formed the burden of the beast, the busy ants informed me that it was corn on the one side and the clustering flies that it was honey on the other." Thus the lawyer should have a strong common sense and intimate knowledge of the intricate affairs of human life.

## CHAPTER 2

### Examination-in-Chief.

The examination of witness by a party who called him is called "Examination-in-chief." See S. 137, Indian Evidence Act.

It is direct examination. The examiner-in-chief must obtain from the witness all that the witness knows in the party's favour. He is bound to complete his examination of all the desired topics before the opponent's cross examination begins. If a material question has been omitted in the examination-in-chief of a witness, it cannot be asked as a matter of right in re-examination, but the Court has got discretion to allow such question subject to the condition that the opposite party must in such case be given an opportunity to cross-examine the witness on the new matter. In examination-in-chief evidence may be given of the existence or non-existence of every fact in issue and on such other facts as are declared relevant by S. 5, Indian Evidence Act.

There are few exceptions to this rule, *e. g.*, a witness may be questioned as to any circumstance which he observed at or near the time or place at which a relevant fact, to which he has deposed, has occurred. See Section 156 of the Evidence Act, which lays down that when a witness who is intended to corroborate and give evidence of any relevant fact, he may be questioned as to any other circumstance which he observed at or near time or place at which such relevant facts occurred; if the Court is of opinion that such circumstance, if

proved, would corroborate the testimony of a witness as to the relevant fact which he testifies. Again, a former statement by witness relating to the facts as to which he has deposed, made at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved. See S. 157, Indian Evidence Act.

**Method in Examination-in-Chief**—The faculty of interrogating a witness is unquestionably one of the arcana of the legal profession, and, in most instances, at best can only be attained after years of forensic experience. In direct examination, although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even still more rare. For it requires mental powers of no inferior order so to interrogate each witness, whether learned or unlearned, intelligent or dull, matter-of-fact or imaginative, single-minded or designing, as to bring his story before the tribunal in the most natural, comprehensible, and effective form. It is the duty of counsel to bring out clearly and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. The task is more difficult than may at first sight appear. The timid witness must be encouraged; the talkative witness repressed; the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness, however should be left to tell his tale in his own way with as little interruption from counsel as possible. In criminal cases, the duty of counsel for the prosecution is wider. It is the practice, and probably the duty, of a prosecuting counsel to ask a witness questions favourable to prisoner; for he must lay all the material evidence before the Court whether it tells in favour of prisoner or not, and not unduly press for conviction.

Sir James Carlett, one of the most successful English advocates of modern times attached great importance to the examination-in-chief, and would never delegate this trust to another lawyer in a case in which he appeared, but always examined his own witnesses in person.

David Paul Brown, one of America's leading advocates, has laid down certain rules for examination-in-chief, which are acknowledged universally as safe guides. They are reproduced below :—

(1) If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner towards them which may be calculated to repress their assurance.

(2) If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue; as, for instance,—Where do you live? Do you know the parties? How long have you known them? and the like. When you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the cause, being careful to be mild and distinct in your approaches, lest you may trouble the fountain again from which you are to drink.

(3) If the evidence of your own witnesses be unfavourable to you—which should always be carefully guarded against—exhibit no want of composure: for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.

(4) If you see that the *mind* of the witness is imbued with prejudices against your client, hope but little from such a quarter—unless there be some fact which are essential to your client's protection, and which that witness alone can prove, either do not call him, or get rid of him as soon as possible. If the opposite

counsel see the bias to which I have referred, he may employ it to your ruin. In judicial inquiries, of all possible evils the worst and the hardest to resist is an enemy in the disguise of a friend. You cannot impeach him; you cannot cross-examine him; you cannot disarm him; you cannot indirectly even, assail him; and if you exercise the only privilege that is left to you and call other witnesses for the purpose of an explanation, you must bear in mind that instead of carrying the war into the enemy's country, the struggle is between sections of your own forces, and in the very heart, perhaps, of your own camp. Avoid this by all means. (5) Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination. Take from your opponent the same privilege it thus gives you, and, in addition thereto, not only render everything unfavourably said by the witness doubly operative against the party calling him, but also deprive that of the power of counteracting the effect of the testimony. (6) Never ask a question without an object nor without being able to connect the object with the case if objected to as irrelevant. (7) Be careful not to put your questions in such form that if opposed for informality, you cannot sustain it, or, at least, produce strong reasons in its support. Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result. (8) Never object to a question put by your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it indicates either a want of correct perception in making them, or a deficiency of reasons, or of moral courage in not making them good. (9) Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest and make him, also, speak distinctly and to your question. How can it be supposed that the Court and the jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep? (10) Modulate your voice as circumstances may direct. "Inspire the fearful and repress the bold." (11) Never begin before you are *ready*, and always finish when you have *done*. In other words, do not question for question's sake—but for an answer.

### Manner in Examination-in-Chief

'Your *manner* in examination-in-chief should be very different from that which you assume in a cross-examination. You are dealing with your own witness whom you assume to be friendly to you, unless informed to the contrary. You must encourage him if he be timid, and win his confidence by a look and voice of friendliness. It often happens that witnesses, unaccustomed to Courts of Justice, are so alarmed at their own new position, that in their confusion they cannot at first distinguish between the friendly and the adverse counsel and they treat you as an enemy to be kept at bay, and to whom they are to impart as little as possible. It is then your care to set your witness right, and a kindly smile will often succeed in doing this. Do not appear to notice his embarrassment, for that is sure to increase it, but remove it quietly and imperceptibly, by pleasant looks, friendly tones, and words that have not the stern sound of a catechism, but the familiar request of a companion to impart a story which the querist is anxious to hear and the other gratified to tell. The most frightened witness may thus be drawn almost unconsciously into a narrative which, when he entered the witness-box, had escaped the memory in his terror.

"Your questions in examination-in-chief should be framed carefully, and put deliberately. You never require in this that rapid fire of questions

which is so often requisite in cross-examination. You should weigh every question in your mind before you put it, in order that it may be so framed as to bring out in answer just so much as you desire, and no more. You have time for this, if you are as quick of thought as an advocate should be, while the Judge is taking his note of the previous answer, but even if this be not sufficient for your purpose, you must not fear to make a deliberate pause. The Court will soon learn not to be impatient of your seeming slowness, when it discovers that you have in fact abbreviated the work by a pause which has enabled you to keep the evidence strictly to the point at issue. "Sometimes it demands considerable discretion to determine whether it is better to permit the witness to tell his own story in his own way, or to take him through it by questions. No rule can be laid down for this. It must depend upon your discernment at the moment. There is a class of minds who can recall facts by recalling all the associated circumstances, however irrelevant, they must repeat the whole of long dialogue, and describe the most trivial occurrence of the time in order to arrive at any particular part of the transaction. With such you have no help for it but to let them have their own way. It is the result of a peculiar mental constitution, and endeavours to disturb their trains of association will only produce inextricable confusion in the ideas of the witness, and you will be farther than ever from arriving at your object. But if you are dealing with that other class of witness, happily more rare, who appear to have no trains of thought at all, who can observe no orders of events, whose ideas are confused as to time, place, and person, your only chance of extracting anything to your purpose is to begin by requesting that they will only simply answer your questions, and falling in, as it were, with their own mental condition proceed to interrogate them, after their own fashion, with disconnected questions, and so endeavour to draw out of them isolated facts, which you will afterwards connect together in your reply, or which dovetail with the rest of the evidence, so as to form a complete story. "This plan will often be found effective with such witness, when all the usual methods of eliciting a narrative from them have been abandoned in despair; of course it demands great tact and readiness; but it is presumed that unless you possess these qualities you will not attempt to become an advocate." *See Cox's Advocate.*

The examination of a witness-in-chief is as important a branch of advocacy as any other. As a rule young practitioners have very little notion of the method in which a witness should be examined. A witness is seldom in a comfortable frame of mind when he enters the box for the purpose of being examined. He feels nervous, agitated, and confused, and if the advocate examining him is equally disturbed in his manner, and not careful and experienced enough to make the witness tread his path smoothly, the witness becomes still more confounded, and instead of getting the facts out of him in a proper and complete form, his examination produces merely an incoherent mass of material.

A great deal of mischief could be avoided if the examiner takes care to make himself acquainted with the nature of the witness whom he has to examine, and to put questions to him in the manner most appropriate to his comprehension and intelligence. The examiner must first take into consideration the idiosyncrasies of each witness, and should conform to the method of interrogation most suited to the particular individual. When a witness is timid the advocate should first ask a few unimportant and simple questions so that the witness may recover his composure. With a stupid witness a great deal of patience and tact is necessary on the part of the

examiner for if the witness becomes confused, he will be liable to say things which he did not intend to say and thus damage the cause in whose interest he has been called.

The advocate should frame his questions with great care, in order that the witness may be enabled to readily understand him. He should use the simplest language in which to express his ideas, and should call a spade a spade, and not an implement of husbandry. It is easy for an advocate to make a mistake of this kind. He is too apt to take it for granted that the witness is not only intelligent, but well educated.

The advocate should avoid asking leading questions where he can do so. While the general rule, which is well known, is that leading questions should not be asked, there are many exceptions to it, and the whole matter rests in the sound discretion of the Court. Leading questions may be asked upon matters which are not material but merely introductory or preliminary; the Court will permit them to be asked where the witness appears unwilling and hostile to the party calling him; they may be asked when they will assist the memory of a witness where it appears defective, especially if the subject is a complicated one; and lastly, they may be asked for the purpose of identifying persons or things, and the attention of the witness may be directly called to them.

### Duty of Opposing Counsel.

**Duty of Opposing Counsel.**—Mr. Cox's advice as to the duties of opposing counsel pending examination in chief is so valuable that we shall give it entire. He says: "While the examination in chief is proceeding, it is the duty of the counsel on the other side to give the most attentive ear to every question and every answer, and to take a note of them. When this duty devolves upon you, it may, perhaps, be performed all the more satisfactorily by the observance of some rules which experience has approved.

"You must mark every question put to the witness, with a double purpose: first to be sure that it is properly put, according to the rules of evidence, and secondly, to ascertain what is its bearing upon the case, and the design of your adversary in putting it.

"Great keenness of perception and readiness of apprehension are requisite to the performance of this task. You will need to have the law of evidence at your fingers' ends, that if the question be an improper one, you may interpose instantly *before the answer is given*, to forbid the witness to reply, and then not only to make your objection to the Court, but to support it by *reasons*.

"And here let us warn you against the fault of making too frequent and too frivolous objections. Many inexperienced men appear to think, that by continually carping at the questions put by the other side to the witnesses, they are proving to the audience how clever they are. But this is a mistake. Such an exhibition of captiousness, whether affected or real, is offensive to the Court and to the jury. Nothing is more easy than to find opportunities for this sort of vanity, without starting objections actually untenable, because, in practice, a vast number of questions *are* put which in strictness are leading, and, therefore, if objected to, could not be permitted. But you should *never* object to a question, as leading, *merely because it is such*, but only when it appears to you to be likely to have an effect injurious to your cause. And when you have occasion to make such an objection, do it good-temperedly, and as appealing to the better judgment of your opponent, whether he does not deem it to be an improper question; nor

address the objection to the Court in the first instance but to your adversary, and only if he persists in putting it should you call upon the Court to decide between you which is right. "But it is not only against improper leading questions you have to be upon the watch; there are many others still more objectionable, which it will be your duty, by an instant objection, to prevent. As soon as the words have fallen from your opponent's lips, and before the witness can have time to answer, you must interpose, first, with an exclamation to the witness, 'Don't answer that,' and then, turning to the Court, state what is your objection to the question, with your reasons for it. Your opponent will answer you. Then you will have the right of replying, and the Court will decide between you!

"There is, perhaps, no part of the business of an advocate in which the fruits of experience are more obvious than in this. If you watch closely the examination of witnesses, in a trial where an experienced advocate is on the one side and an inexperienced one on the other, you will see the practised man putting question after question, and eliciting facts most damaging to the other side which his adversary might have shut out by a prompt objection to them, but which he permits to pass without protest, because he is not sufficiently practised in the law of evidence to discern their illegality on the instant, or so much master of it as to give a reason for objection, even though he may have a sort of dim sense that the questions are wrong somehow, and he protests against leading questions, while he permits illegal questions destructive to his client to be put without a murmur. On the other hand, when it comes his turn to examine his witnesses, and on the experienced man devolves the duty of watching, you will see how, in no single instance, is he suffered to tread over the traces; but the strictest rules of evidence are enforced upon him, so that he sits down, leaving half his case undeveloped, while his adversary has brought out all that he desired to elicit. *See Wrottesly, pp. 43--46.*

### General Hints regarding Examination-in-Chief

1. To examine witnesses properly and efficiently you must know what they will say, and it is also necessary to be conversant with, and constantly bear in mind, the leading features of your case. This knowledge supplies the basis of the style to be adopted, and enables one to elicit the evidence in the most advantageous manner.

2. In examining a witness "the order of time ought always to be observed." Let the events be told in the order in which they occurred, with the accompanying conversations if important and admissible, and their minor incidents if material. 3. In examining witnesses-in-chief it is advisable to let them tell their story in their own words, provided they are confined rigidly to the material points in the case, and to those alone which it is necessary to bring out for the establishment of your case. 4. It is always inadvisable to lead one's own witness, as his evidence will thus appear to be tutored or prepared; on the other hand, it is equally damaging when the witness comes out with a long set story which has the appearance of having been learnt off by heart. 4. Let the witness under examination tell his story "in his own way." The fewer interruptions the better and the fewer questions the less questions will be needed. Watching should be the chief work: especially to see that the story be not confused with extraneous and irrelevant matter. 6. One should be greatly on one's guard with a witness of whom one is not sure, for by proving faithless to the side by which he is called, he becomes extremely dangerous, because his statement carries the authority of admission. 7. A skilful examiner conducts his examination in such a way as not to render the witness examined by him an



easy prey to the cross-examiner. 8. You ought to leave your witness in such a position, as to enable him to withstand the attack of his cross-examiner easily. The most effective way to secure this result is to elicit every fact completely and in all its important bearings upon the attendant circumstances." See Rahmat Ullah on Cross-Examination.

### Improper Questions in Examination-in-Chief.

(i) A compound question, one part of which is admissible and the other inadmissible may rightly be excluded as a whole. Woodroffe Ev., 9th Ed., 979.  
 (ii) Leading or scandalous questions are not permitted. See Ss. 141-143-151.  
 (iii) If a question of the nature of cross-examination is put to one's own witness without declaring him hostile, the question and answer are both inadmissible and cannot be taken into consideration. 1 P. 758: 24 Cr. L. J. 69, 58 C. 372: 1926 C. 139: 27 Cr. L. J. 266. (iv) The Court may forbid any question or inquiry which it regards as indecent or scandalous although such questions and inquiries may have some bearing on the questions before the Court unless they refer to the facts in issue or to matter necessary to be known, in order to determine whether or not the facts in issue existed. See S. 151, Evidence Act. (v) The court may in its discretion permit the party who called a witness to put any questions to him which might be put in cross-examination by the adverse party. Such witnesses are called hostile witnesses. See S. 154, Evidence Act.

### Leaving Flaws in Examination-in-Chief.

A lawyer who has not thoroughly prepared his case and who has not noted all the facts relevant to the time, place and the persons who are acquainted with the facts of the case is liable to make some mistakes in examination-in-chief.

### Illustrations.

(i) As an example of one of the very best lawyer's omitting a very small point, the following incident in the professional experience of Mr. Campbell may be noted. 'This was a case which took place in the House of Lords, the trial of a Peer by his Peers, the trial of the Earl of Cardigan, who was the man who led the charge of the Light Brigade at the battle of Balaklava, and who rode at the head of the "gallant six hundred" of whom Tennyson has sung. The Earl was indicted for fighting a duel. He had challenged one of his subordinate officers, Captain Harvey Garnett Phipps Tuckett, to meet him in Wimbledon Common. The captain having married a very attractive young woman, the Earl became quite attentive to her and this led to the quarrel. The Earl, being a member of the House of Lords, claimed the privilege of being tried by the Peers, and for the first time in sixty years since the trial of Lord Lovatt, the House of Lords including Lords Brougham, Lyndhurst, Denman, Wynford and others, met to try a noble lord. The question was whether the Earl had violated the statute which made duelling a capital offence, provided of course there was intent to kill. The Attorney-General at that time was Sir John Campbell, author of the lives of the Lord Chancellors, subsequently himself a Lord Chief Justice of England, and still later a Lord Chancellor; and moreover he was the son-in-law of Sir James Scarlett. The opening of the Attorney-General indicated absolute assurance that he was going to convict, and everything undoubtedly showed that the Earl had sent the challenge. On a hill which overlooked the Common there stood a mill with a platform around the upper portion, from which point of vantage the miller and his son had seen the carriages containing the duelling parties approach. They saw the parties alight, saw the seconds advance, then stoop over something which evidently was a box containing pistols; take out the pistols, examine them

and then pace off the distance ; then they saw the principals themselves approach, and take the exact position designated by the seconds, wheel and fire ; one fell. The miller, who was himself a constable, seized his long staff of office and immediately approached the field and made arrests. He took the men up to his house : and asked them separately for their cards. One card was handed to him by the wounded man, which contained the name of Phipps Tuckett. The Earl had no card, but said he was the Earl of Cardigan.

"The Attorney-General, confident that no answer could be made by the Earl to the facts of the case, after arguing on the meaning of the statute, contented himself by putting in evidence the facts which I have briefly detailed, and then attempted to offer in evidence the card which Captain Tuckett had handed to the miller. Instantly that most accomplished of English Advocates, Sir William Follett, objected. His objection was based on the fact that the card had been handed by Tuckett to the constable in the absence of the Earl and the Earl of course could not be bound by anything which took place in his absence, particularly if anything was written on the paper. Well, the objection was so unexpected that it irritated Campbell, and he attempted to argue that it was preposterous for his friend to object to that. He said that the Earl had been identified as the man on the ground, that he had been arrested without any attempt to escape, that he had fired in the direction of Tuckett, that Tuckett had fallen, was wounded, and then a few minutes later handed a card to the constable, and there had been no separation of the parties. The cause was presided over by Lord Denman. The Chief justice waived the objection aside, saying that this was not the exact stage at which the offer should be introduced. Campbell went on and attempted to show exactly who Captain Tuckett was and what relations he maintained to the Earl, and then suddenly closed his case ; but just before closing he made a second offer to the card. Follett believing that there was some good reason why the Attorney-General was so anxious to have the card in evidence, said : "Will you kindly let me see the card because I will not press the objection?" The card was handed to him ; he looked at it and, in an instant, said : "I have no objection to the offer of this in evidence." It was received with the words on it "Phipps Tuckett." The Attorney-General then said : "The Crown rests," Follett rose and impressively said : "The defence has no evidence to offer ; I move for the discharge of the prisoner." "On what grounds?" asked the astonished Campbell. "The indictment charges that the Earl of Cardigan drew a deadly weapon and with intent to kill fired at one Harvey Garnett Phipps Tuckett ; on his card which was handed by the wounded man are the words Phipps Tuckett ; there is no proof that Harvey Garnett Phipps Tuckett and Phipps Tuckett are the same man."

"Now, gentlemen, imagine a situation before the Peers of England in which the Attorney-General then sixty-three years of age and an advocate of great experience had absolutely failed to secure proof that the name on the card belonged to the man who was identical with the individual whose name was inserted in the indictment. A debate took place and all the great lawyers agreed that it would have been a simple thing for the Attorney-General to have identified the two names belonging to the same man, but he had failed to do it. It would have been easy enough for a witness to have been called who knew Harvey Garnett Phipps Tuckett, and who could have identified him as the person at whom the Earl had fired. The identification would then have been complete, but there was an absolute breakdown in the proof because of a failure to think out beforehand what exigencies might arise. I give this as a sample to indicate a lesson which you cannot get from a book on evidence." 14 M. L. J., 268—65.

(ii) **Theft case**—There was a theft case in which a number of household articles of ordinary type were stolen from the house of the complainant. The evidence against the accused was very damaging because all the articles were recovered from his exclusive possession. The accused was convicted and the case came up in appeal. The perusal of the record showed that the complainant never stated in the Court that the articles belonged to him. It was fatal mistake committed by the Public Prosecutor conducting the case, as the property recovered could not be proved to be the stolen property. The result was obvious. Omission of one question as to the ownership of the property turned the case in favour of the accused who was ultimately acquitted.

### Questions in the Nature of Cross-examination in Examination-in-Chief.

If a counsel, without getting the witness declared hostile, puts any question which is in the nature of cross-examination, then the question and the answer must be ruled out as inadmissible, and cannot be used as a piece of evidence 1 P. 758, 1926 C. 139=27 Cr. L. J. 266.

## CHAPTER 3.

### Preparation for Cross-Examination.

A lawyer should never begin to cross-examine a witness without thorough preparation and absolute mastery of facts. "Never commence cross-examination of a witness without best preparation and without posting yourself with all the necessary details concerning the witness and the point on which he would be called upon to depose. 11 Cr. L. J. 77.

It has been said that to a great extent cross-examination is intuitive just as music is, just as painting is and while the amateur beginning his music or his painting may not be very successful, for it requires training, practice and experience, and by and by he develops into a great musician or a great artist, but in order to do that he must have an intuitive genius. Even the genius, sometimes, will not be developed along the line of study or thought or education. Education itself requires a vast knowledge of experience to make it effective in the hands of cross-examiner. There must be a very extensive knowledge of the ordinary business and personal affairs of human life because it is by this and this along that we reach motives and passions and the methods of the witnesses. 11 Cr. L. J. 73.

A counsel should never cross-examine an expert witness unless he has acquired a thorough knowledge of the subject in that particular branch, at least as much as the expert himself has got 11 Cr. L. J. 83.

A lawyer in Court without a brief is like a captain at sea without his chart; a driver without a tried horse; a marksman with an unknown gun. But one with a well mastered case is strong in every emergency, indeed his victory is over half-accomplished.

Most students in their innocence think that successful practice of legal profession consists in making eloquent speeches, bullying ignorant or innocent witnesses and occasionally making impudent attacks on their opponents and sometimes jocular remarks. In order to be successful as lawyers, the first essential is that you should be most devoted students of the law. Book knowledge of law is like a chest of fire tools in the hands of an unskilled artisan, useful, but impracticable without experience. Practice in law must be largely learnt from contests in Courts. It is the lawyers' trade; the more he has of good practice, the better he will know how to apply his learning.

"Cross-examination has been likened to a two-edged sword, but it is infinitely more dangerous than that. It is more like some terrible piece of machinery—a threshing machine for instance—into which an unskilful and unguarded advocate is more likely to throw his own case than his opponent's." *See Harris, p. 44.*

The work of preparation is of transcendent importance. No pains should be spared. Small things should not be neglected, they often turn the scale. The maxim of Napoleon should be borne in mind: "When you have resolved to fight a battle collect your whole force. Dispense with nothing. A single battalion sometimes decides the day." It would be as unwise for a soldier to engage in battle without arms or ammunitions, as for a lawyer to undertake to try a case without having first made adequate preparation. "To be thorough in the preparation of the law and facts in every case, is one rule that the advocate cannot safely violate. He should be prepared to discuss every question which may arise during the trial of the case, and should have every position which he takes well fortified with authorities. *See Hardwick, p. 21.*

"In a forensic contest, where one of the parties engaged is necessarily compelled to be humiliated by defeat, it is safe to say that there will be few stones left unturned in the search for everything which may aid in winning a victory. After the law has been carefully briefed, an abstract of the testimony should be made. The advocate should examine in person each witness he intends to put upon the stand, separately from the other witnesses, and take down in writing the substance of what he says. He should caution the witnesses as to their demeanour in Court while testifying, especially those who are inclined to be diffident, pert, forward, or irascible. The best witnesses should be chosen. That is, the most intelligent and honest witnesses should be selected where the testimony of other witnesses, if introduced, would be merely cumulative. Often the testimony of one dishonest or foolish witness, called unnecessarily, will destroy the effect of the testimony of all other witnesses called on the same side. Too much stress cannot be laid upon this suggestion. Avoid by all means possible, the necessity of calling a witness of bad character, for greater damage may be done to the side for which he is called than can be remedied by many witnesses of good character. Sometimes it is absolutely necessary to call a witness who does not stand well, but it should never be done if his testimony can be supplied by reputable witnesses." *Ibid.*

When you have an important case you should take your witness in hand. Examine him. Write down what he says. Have your typewriter, make a copy of it. Hand it to him. "Mr. Smith, look at this testimony. Read it over carefully. If there is anything wrong come back and tell me of it and correct it." Smith takes that testimony home, he reads it, he comes back the next day says, "Yes, that is all right." You begin cross-examining him upon the theory that you are the opposing counsel, and you find that it is not so at all. You find that Mr. Smith has not told the truth. You write out another copy of his testimony; you may write out a third and a fourth statement, and you may rehearse it, and you may get all your witnesses together, and then when they go upon the stand you will find that they may know something that they did say, or that they have said something that they did not know. In other words, your witness goes to pieces right before you. He may be an honest man or he may not be an honest man; he is simply a bad witness." 12 M. L. J. 369.

The following advice is given by Quintillian regarding the investigation of facts and preparation of a case:—"The next particular that occurs is the manner of studying a cause which is the advocate's ground work. There is hardly one of so slender a genius, who, when he has taken pains to learn everything in a case, but may be sufficient to inform the judge of it. But how few

are there that give themselves much trouble in this respect! To say nothing of the negligent, who give themselves no concern about the main point of the question, so there be incidents from persons and commonplaces which may afford them a bundle for being clamorous; there are some so addicted to vanity, who, either partly as busy, and pretending always to have something, must first clear their hands of, order the client to come to them to the eve, or the very morning of the trial, and sometimes they even boast that they heard him only a moment before the Court was sitting; or, who partly to glory in their fine wit and parts, and that they may appear to have a most ready conception, pretend to know and be intelligent in the matter before they have scarce heard anything; so that when they have blabbed out a deal of nonsense in their eloquent strain, and with the greatest fracas imaginable, by which the judge is not a whit the wiser, nor the cause the better, they procure themselves another instance of their insipid vanity, to be led back to the forum, in all their noble sweat and fatigue by a tribe of sycophants. "I can as little bear with the delicacy of those who give orders for the matter to be laid before their friends; though indeed here the mischief is less, if these inform themselves properly of it, and afterwards state it with the same exactness. But who shall learn this exact state so well as the advocate himself? And how shall the solicitor, that go between interpreter, take pains at conning patiently and strictly an action, which he is not to speak to himself?

"Again, it is a very bad custom to imagine the information is sufficient which is had from those brief or memoirs, which either the parties themselves compose, who have recourse to an orator, as not being qualified themselves to plead in their cause; or are composed by some of those advocates, who acknowledge their inability for pleading, yet execute what is most difficult in regard to it. But one should think that person ought to show himself the orator who does a very difficult part of his duty, being able to judge what ought to be said, and what ought to be suppressed, where some things ought to be altered. These persons, however, would not hurt the cause so much if they wrote down every particular, as transacted. Now they add to things as they might have happened, design the plausible pretexts, and something even of worse tendency. In this condition they are received by most orators, who adhere to them inviolably, as a school-boy does to the heads of his theme; but the mischief is, they afterwards find themselves grossly mistaken, and the state of the cause they refused hearing from their clients, they learn to their confusion from the adversary's pleading." *Hardwicke's Art of Winning Cases.*

"Careful preparation gives the attorney confidence in himself, which is an important element of success at the bar. The Hon'ble Daniel S. Dickinson, in an address delivered in 1838 to the graduating class of the law department of Hamilton College, said: "There is no royal road to position at the bar, no stealthy bye way through which it can be reached, no slippery and filthy step-stone by which bribery can ascend to purchase it, no hot-bed growth which will produce it, no forcing process which will prove successful. No superficial gilding will conceal shameful ignorance; no spreadeagle declamation pass current as a substitute for knowledge; no spouting and floundering on the surface can deceive a discerning public. But drafts at sight upon the golden granary of learning will always command a premium and be duly honoured. No diligent student, of good natural capacity, ever failed of success; no indolent genius, however gifted and brilliant, ever gained eminence at the bar. 14 *Cr. L. J. PP.* 17—19.

"It has been truly said that a lawyer must labour when the Court indulges in relaxation, and study when his clients slumber. He should never bring a case on for trial unless he is thoroughly prepared. The witnesses

to be summoned on the side of his client should be interviewed in advance of the trial and an abstract made of the principal points of their testimony. The utmost care should be given to the arrangement of the evidence in its logical order, so that when presented it will have its full probative effect. The sequence of the events involved in the *res gestæ* should be noted when preparing the case for trial. Every law-suit is a drama in which the respective counsel play the leading parts; the lawyer must, therefore, consider the dramatic unities of time and place, of cause and effect and so develop the evidence as to create the greatest effect upon the jury. *Ibid.*

"The only way in which a man can ever hope to be a successful cross-examiner is to prepare, and not wait until the moment, expecting favourable circumstances which will arise occasionally. I look upon the preparation for cross-examination as being infinitely more important, if there is a serious dispute about the facts, than the preparation of a brief. You have seen men who have gone into the witness-box, you have seen them in the city and elsewhere, who have told a story absolutely and apparently straight and frank, and manifestly without any equivocation or any feeling of any kind whatever. You have seen the man leave the box, a wholly discredited witness. Why? Not cross-examined by the man who takes his brief and makes his notes on the margin as the witness goes along, but cross-examined by the man, whoever he might be, who has devoted hours and hours of preparation to that particular witness, and who knows exactly his line of conduct and the way in which he should proceed with his art of cross-examination. 20 M. L. J. 288.

"Now, I should say that the one great object is to avoid any complications with the positive facts. The way to do the work in that respect, would be for a man to marshal his collaterals, to see what the bearings of these collaterals are, whether it is scientific, mechanical or ordinary everyday occurrences. Let him study and work out the problem; let him prepare his headings and methods carefully. In these days, of course, we all know pretty well what is coming on at a trial. We have our discovery; we have our witnesses; we all know what line the man is going to take. If a counsel will only devote himself to it, and will spend an hour or two, or a day, if necessary, to prepare his method of the cross-examination of that particular person, he will find that in every case he has accomplished infinitely more than he could possibly do, no matter how crafty he may be, by trusting to the spur of the moment. I can only say that—I as far as I am concerned—I can only say that in many cases I have spent more than a day, yes, I may say two days, in some particular cases, where there has been an important witness, actually preparing for a cross-examination to the exclusion of everything else in business, where the issue depended largely upon the testimony of that witness." 20 M. L. J. 283.

"Never go to your opponent, especially your lay opponent, to try to entrap him into admission, which you are afterwards to depose to in Court, and, after that, be subjected to bitter and severe cross-examination and comment by counsel, and, perhaps also by the Judge.

"Draw your briefs with care, avoiding intemperate language, and making your statements and proofs as clear and terse as possible; remembering that briefs are often necessarily read hastily by counsel, when a confused and prolix statement may prevent them from readily acquiring a correct impression of the case, or make them even take a wrong one, which it may be too late to correct. "Give the pleadings at length; not contending yourself with merely indicating their substance and effect. A sheet or two spared by this means is no compensation for the serious

inconvenience and danger often attending it. Counsel may be much misled by your so doing. The cause often depends on the very words in which the pleadings are couched, and on which critical issues are generally taken. "Never let a brief go into counsel's hands with blanks in it for names, dates or sums of money. It not only has a very solvently unbusinesslike appearance, but often greatly embarrasses counsel who may not have you at their elbow to supply them with the necessary information. No brief should be regarded by you as complete till you have carefully gone over it and filled up every blank, or, if that be, for any sufficient reason, impracticable before delivering the brief, take care to say as much on the margin. "When there are two or more briefs, and especially if they be of length, or intricate in detail, or refer to many documents, use your utmost efforts to have the pages of all the briefs numbered alike, so that any one counsel, having found what is required, during the progress of the cause, may in an instant place his companions in the same situation. Your law stationer is surely bound to obey your orders in this respect. I have heard a neglect of this matter often loudly complained of, and with justice, as both inconvenient and irritating, in sudden exigencies. "In cases of a little more difficulty or importance than usual, you may greatly facilitate the labours of counsel, and enable them readily to do their duty, by prefixing to the brief a great analysis, of the case, of both pleadings and facts, referring to the different pages in the brief where they will be found, and, above all, giving an alphabetical index of the names of the witnesses, and the pages where their proofs are placed. "If you have obtained what you may deem an able opinion upon the case, or even upon the evidence necessary to support it, [copy that opinion in your brief for the guidance of counsel at the trial, whom it may quickly put in possession of the true bearings of the cause, and apprise them of its difficulties, timely enabling them better to deal with them. The most eminent leading counsel by no means regard such assistance as superfluous, but, on the contrary, welcome it. More than once I have seen them, where a cause was called on before they had time to read their briefs, as it were, devour the 'opinion' written by some able and experienced junior, and rise soon afterwards wonderfully possessed of the case especially when engaged for the defendant.

"Whenever your case involves localities, let me entreat you to take the trouble of giving a faithful sketch of the *locus in quo* in one of the pages of your brief, or on a separate paper. A single glance at a spirited and faithful sketch of the scene of action will be worth half a dozen consultations. It will fix the matter firmly in your counsel's mind, and prevent him from either being confused himself, or suffering the witness, Judge or Jury, to be confused. Take care also to have several copies in readiness (being able to prove their accuracy) to lay before the Jury, while counsel is addressing them, a matter that is of no slight importance to your client's interest. A good model of the premises, or machinery, is of incalculable service, in giving counsel, and enabling them to give others, a clear view of the case which it illustrates. During last Easter term the Court of Common Pleas was occupied for an entire day with a troublesome motion for a new trial, in a patent case. There was no model to illustrate the statements and arguments of counsel, or the evidence of the witnesses. The Judges found it almost impossible to deal satisfactorily with the case, and at the close of the day, one of them (Mr. Justice Maule), as the Court rose, observed, 'In the absence of a model the evidence might really all have been read the wrong way.' Take a special care, however, that your plan or model be fair, perfectly faithful, made by a disinterested person, with no instructions whatever but to prepare an impartial and accurate representation of the reality, one which will be acquiesced in by the opposite side, and by the witnesses. This will obtain



for you credit with both the Judge and the Jury for the fair and candid spirit in which you have brought forward your case, and that credit may serve to turn the scale in your favour, in a question of doubt and difficulty. An opposite course of conduct is almost sure to prejudice you in professional and public estimation, and of throwing discredit on your client, and his case, seriously endangering one otherwise characterized by *bona fides*." Warren on the Duties of Attorneys.

"Mr. Benjamin, Q.C., was without doubt a distinguished and very forceful advocate, and altogether his career was an extraordinary one. I was introduced to him shortly after he became a member of the English Bar, with reference to a suit in the Court of Chancery instituted by the American Government. Mr. Benjamin as a friend of those interested was given a junior brief. The case came on for hearing before Lord Justice James, then Vice-Chancellor, and it appeared to be generally thought that, as usual at the time, a decree would be made directing enquiries in chambers. The matter was being so dealt with when Mr. Benjamin, then unknown to any one in Court, rose from the back seat in the Court. He had not a commanding presence, and at that time had rather an uncouth appearance. He, in a sententious voice, not in accord with the quiet tone usually prevailing in the Court of Chancery, startled the Court by saying, "Sir, notwithstanding the somewhat off-hand and supercilious manner in which this case has been dealt with by my learned friend Sir Roundell Palmer, and to some extent acquiesced in by my learned leader Mr. Kay, if, Sir, you will only listen to me (repeating the same words three times and on each occasion raising his voice), I pledge myself you will dismiss this suit with costs." The Vice-Chancellor and Sir Roundell Palmer, and indeed all in Court, looked at him with a kind of astonishment, but he went on without drawing rein for between two and three hours. The Court became crowded, for it soon became known that there was a very unusual scene going on. In the end the Vice-Chancellor did dismiss the suit with costs, and his decision was confirmed on appeal." See Jottings of an Old Solicitor.

Although Mr. Serjeant Byles (afterwards Mr. Justice Byles) was a very successful advocate, he cannot properly be said to have been a great or powerful one. Undoubtedly, however, he was most successful. His success was doubtless to a considerable extent due to the close attention he gave to every case. He studied what fell from the Judge, and watched with a hawk's eye the countenance of the Jurymen in order to gather their impressions. And he closely watched the demeanour of every witness and the conduct of the case by his opponents, drawing conclusion from any hesitation as to the course they should pursue. I recollect it was said of him that it was a case of fighting with the needle rather than the sword; but however that may have been, he was eminently successful. He was, in his day, engaged in particularly every case in the Court of Common Pleas, and was generally counsel for the plaintiff, which is, of course, a great advantage. The right of reply was perhaps in those days more important than it is now. Sir George Honyman was in the habit of saying he was prepared to advise that "an action for negligence would be maintainable against an attorney who commenced an action in the Court of Common Pleas and did not retain Serjeant Byles." See Jottings of an Old Solicitor.

"The first and foremost duty of cross-examiner lies in ascertaining all the necessary facts from the party on whose behalf he is retained, remembering that even the most powerful imagination cannot supply all the subsidiary and collateral facts in their full detail. In order to do this he is expected not to be satisfied with what the parties according to their own untrained and inexperienced view lay before him. By a careful survey and a thorough investigation he will find a number of material things supplying him with realistic proofs, which cannot be



afforded by oral testimony. The importance of realistic or as lawyers call them circumstantial, proofs is not generally comprehended by people of ordinary intelligence. The person concerned from whom the cross-examiner has to take instructions, are not usually capable of knowing the *pros* and *cons* of their case, or measuring the weight and importance of the material facts available, and their adequate bearing upon points in dispute. It should be your duty therefore to reach those facts by the force of your own intellect, and to extract, them from the parties, and the surroundings of the case." See Rahmatullah, p. 85.

"Miracles are not common now-a-days," remarks Mr. Harris. "Events follow one another in a natural course; and as one is often the cause and another the effect, the most important result may depend upon the merest trifle. Take the familiar 'running down case.' Two vehicles come into collision, and the respective drivers no less so in their evidence. Each throws the blame on the other, and if both were believed, there could have been no accident at all, because each would have been upon his proper side of the road close to the kerb, with the whole width of road between them. They cannot therefore both be accurate. Other witnesses give other impossible stories. The very position of the vehicles after the accident may be a disputed point, and therefore of no assistance to the jury. But there may be a very trifling scratch or indentation on a wheel or a shaft which may be all important; and what it was produced by may be more important still. Its direction and shape may also be material. This will show how necessary it is to get out every fact, however trifling, that may be of importance to your case. After mastering the facts, the next essential is an accurate mental picture of those facts. You must digest and arrange them in your own mind. Mark their bearing and effect. Draw your own legitimate inferences from them, and then see how you can manipulate them best for purposes favourable to your cause, bearing in mind that "the strength of advocacy lies in the adaptation of your materials to the end designed." Like a good general the cross-examiner ought to have a thorough knowledge of the nature and strength of the facts at his command before entering the battlefield. After having done this, he will have only to determine the manner and method of bringing his different forces into action. "There have been very few cross-examiners of repute who did not thoroughly master the details of their case and the subject-matter of the issues, and all the favourable and unfavourable circumstances, before the commencement of the trial." See Rahmatullah, p. 86.

The secret of success of Benjamin F. Butler was his studious preparation for cross-examination. To use his own language, "a lawyer who sits in his office and prepare his cases only by the statements of those who are brought to him, will be likely to be beaten. A lawyer in full practice who carefully prepares his cases must study almost every variety of business, and many of the sciences."

Roscoe Cankling used to study for his cross-examination important cases with the most painstaking minuteness. In the trial of the Rev Henry Burge for murder, Cankling saw that the case was likely to turn upon the cross-examination of Dr. Swinburne, who had performed the autopsy. The charge of the prosecution was that Mrs. Burge had been strangled by her husband, who had then cut her throat. In order to disprove this on cross-examination, Mr. Cankling procured a body for dissection, and had dissected, in his presence the parts of the body that he wished to study. As the result of Dr. Swinburne's cross-examination at the trial the presiding Judge felt compelled to declare the evidence so entirely untrustworthy that he would decline to submit it to the jury and directed that the prisoner be set at liberty. See Wellman P. 162,

"The duties of a cross-examiner after the commencement of the trial are of a complex and rather difficult nature, and I should say not always commensurate with the result, but nevertheless of the utmost importance for the success of the cause. It requires the greatest ingenuity, a habit of logical thought, clearness of perception in general, power to read man's mind, intimately to judge of their character by their faces, to appreciate their motives, and above all to discover the weak points of the witness under examination and the improbabilities and impossibilities of the statements made by him.

Besides the materials afforded by the facts and the attending circumstances of the case for purposes of cross-examination as stated above, the other auxiliaries which will enable you in detecting falsehood and in determining the points against which you can effectively direct your cross-examination are supplied by a careful study of :—1. The demeanour of the witness, and the expressions of his countenance. 2. The nature and fabric of his testimony." *See Rehmatullah. p. 88.*

"Wrong advice or negligence in bringing a suit is a gross failure of duty and makes the lawyer liable in damages. Hardwicke says: "Suits by clients against their attorneys are much more frequent now than formerly, and Courts have in many cases held attorneys liable for negligence. It is but just that it should be so. Families are often ruined by the errors of incompetent or negligent lawyers. There is an instance on record, where by the omission of one word, an eminent English lawyer, Mr. Butler, in drawing a will caused a devisee to lose an estate valued at £15,000 per annum. If an accomplished lawyer like Mr. Butler should inadvertently make such a serious blunder, how careful should lawyers of ordinary ability be in the transaction of all legal business? The general rule is, that a lawyer is responsible to his client only for the want of ordinary care and skill that constitutes gross negligence." Hardwicke—*Art of Winning Cases, p. 2.*

"It is a great wonder that suits are not oftener brought by clients against their attorneys for neglect of business than are brought. Then, too, occasionally, a judge will feel called upon to administer a rebuke from the bench to counsel for his negligence in the conduct of a suit, and this public censure is always calculated to greatly injure an advocate." (Hardwicke, p 11). An advocate is bound to use reasonable care and skill in the discharge of his duties. Failure to use reasonable care and skill makes him liable for loss sustained by client, like the members of any other profession. It is his business and duty to know the law. He cannot plead ignorance. He is always liable to his client for negligence and even an agreement that he will not be liable does not protect him. It would be void (see S. 5 of Act XXI of 1926). When a professional gentleman accepts instructions to file an appeal and the client loses his right of appeal on account of the negligence of the lawyer, he would be liable in a Court of law. (*See 37 All. 207.*)

"When he has spent time enough in giving his client a patient hearing, he must assume another character, and act the adversary's part, stating to him all imaginable objections, and whatever the nature of the dispute may bear. He must ask him some shrewd questions, and press him closely for direct answer; for whilst enquiries are made into each particular, we at length hit upon the truth, when least expected. In short an unbelieving advocate is best at learning the merits of a cause; for the client generally makes mighty promises, averring that he is able to produce a cloud of witnesses, that he has authentic and well attested vouchers, and that the adversary himself cannot help the giving up of such and such points..... Having thoroughly examined the cause by taking an exact view of everything favourable or contrary in it, he must lastly

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act a third part by assuming the character of a judge, and by imagining the cause to be pleaded before himself. Then what should move and determine him, if he was to pass sentence upon the same matter, he must think the most cogent and powerful to determine any other; and so he will seldom be deceived in the event, or it will be the fault of the judge." (Hardwicke, pp. 9; 10, 11.)

Chitty in his General Practice says. "Either the principal or a very experienced clerk, who will afterwards attend at the consultation and to the conduct of the cause at the trial, and who will be above the suspicion of tampering with the witnesses, should personally, and in the absence of his client, see and examine each witness apart from the other, so that one may not influence the other as to the exact testimony he will give, and he should particularly inquire whether he has any interest in the event of the action, or whether there are any circumstances which might affect his competency in the opinion of the judge or his credit in the estimation of the jury."

Sarkar, in Modern Advocacy, p. 47 says: "The advocate's task is not complete when he has obtained all information of the facts. He should then turn his attention to the means by which they are to be proved before the Court. Facts are established by oral evidence, documentary evidence and circumstantial evidence. As regards oral evidence, the quality should be aimed at and not the quantity. Evidence is weighed and not numbered. It is wrong to suppose that a point may be established if only a large number of witnesses can be called to prove it. On the other hand the greater the number, the more the risk that they would contradict each other by discrepant and inconsistent statements. A fact may be established by a small number of witnesses, if their testimony is consistent and reliable. In deciding upon the witnesses he should call, the practitioner should have special attention to their antecedents, character, social position and integrity. As they are to be subjected to the fire of cross-examination, they must not be weak in intellect or nervous. Very great discretion is necessary in selecting the witnesses. Here also the advocate should not rely entirely on his client's assertion as to the nature and particulars of the evidence expected from them. If he calls any and every witness to please his client, he is sure to find soon to his utter surprise that the witness would say many things entirely different from what he has assured he would say. It is therefore essential that the practitioner before he decides to put a witness to the box, should have some idea of the evidence he would give." "If the lawyer in preparing his brief should note opposite a statement of what each witness will swear of, the peculiarities, characteristics etc. of the witnesses, he will find it advantageous in the conduct of his case. Entries of this kind should be brief and to the point; for instance: "This witness is too zealous, he should be held with a tight rein." "This is a stupid witness and should be dealt with patiently." "This is a lying witness and he should be examined with severity." "This is a timid witness and should be treated with the greatest kindness," etc. (Hardwicke, pp. 16, 17).

When there is serious doubt about the genuineness of a document, it is imperative that an investigation should be made as to its authenticity. If a practitioner allows a document to be put in without taking care to ascertain that it is really what his client asserted it to be, he should not be surprised if it is found afterwards to contain matters which disprove or injure his case or which is entirely irrelevant. It is better to make a memorandum containing the following particulars: (i) parties to the documents; (ii) short summary of contents; (iii) dates; (iv) how and by whom to be proved. "It is of great importance that the advocate should, at the very outset, make proper notes of the facts of the case. It is a very serious defect in the way in which business is carried on by pleaders in this country that they make as few notes as possible,

You may rest assured that the advocate would forget a very large proportion of the facts, if he does not make a proper note of them. When the facts are fresh and vivid in the mind, it is a common frailty to suppose that one would remember them afterwards. They are generally forgotten within a very short time. The result is that papers have to be studied over and over again, while a proper note made in time would have saved a great deal of time and labour. It is not merely with regard to the facts that it is desirable that notes should be made. That is desirable even with regard to one's own researches and one's own thoughts." (Aiyar's Professional Ethics, pp. 380-381).

Rufus Chate was one of the greatest of modern American advocates and orators. His method of preparing cases was as admirable as thorough. He was an indefatigable worker and devoted considerable time in the preparation of the law and facts of his case. It has been said of him, "that in determining the theory of the case he was never satisfied until he had met every supposition that could be brought against it." One of his biographers says: "If for the plaintiff, a strict examination of all the pleadings, if the case had been commenced by others, was immediately made, and, so far as practicable personal examination of the principal witnesses, accurate study of the exact questions raised by the pleadings, and a thorough and exhaustive preparation of all the law on these questions. This preparation completed, the papers were laid aside until the day of trial approached. At that time a thorough re-examination of the fact, law and pleadings, had to be made. He was never content until everything which might, by possibility, bear upon the case had been carefully investigated and this investigation had been brought down to the last moment before trial. If for the defence, the pleadings were first examined and reconstructed if in his judgment necessary, and as careful an examination of the law made as in the other case." See Sarkar's Modern Advocacy, pp. 50-51.

In criminal trials intricate questions of law are not generally involved. There is always a question of fact. After all the material and available facts are obtained, the next thing to do is to ponder how best they can be made use of. The strong points must be eliminated from the weak ones and the objections that may be urged against the defence theory must be anticipated and met. At the actual trial it may not be necessary to rely on all the points he has thought out. Those that will help him most will be apparent to him after the prosecution case is opened and closed. The prosecution witnesses may have made statements in favour of the defence case; the prosecutor himself may have given away during cross-examination on material points. A point which appeared to the advocate strong may have lost its force, or an apparently insignificant point may have sprung into prominence on account of its connecting link with another point. It may also be necessary to formulate new points in the light of the prosecution evidence. The advocate must keep a vigilant eye over the proceedings and occasions will arise when he may have to throw himself on the resources of the moment in determining a particular line of action. When he has a number of points, it is better to urge the strong ones first and to abandon the rest, if he feels that they have produced the desired effect. If he is fairly certain that the wind blows in his favour, he may dismiss the other points by simply enumerating them casually, and the consciousness that there were other points in favour of the accused which could have been urged will deepen the conviction of the tribunal or the jury. No point is too small or technical in a criminal case. An apparently trivial or technical point may sometimes produce an unexpected result. The advocate is defending a prisoner and he will be failing in his duty if he overlooks a single point, however small, which may after all form a connecting link to a chain of facts in establishing the innocence of the person. This must not be mistaken for niggling at insignificant points or propounding

inconsistent theories which instead of clarifying the ideas make confusion worse confounded. There are lawyers who being unable to put their cases properly either on account of insufficient preparation or incompetence, adopt the device of producing a state of bewilderment by all sorts of arguments and points with the object of creating some doubt. This tactics may succeed in some cases but it is bound to prove disastrous in the long run." See Sarkar's Modern Advocacy, pp. 258-254.

A lawyer can examine the witness in chambers, in order to find out what he has got to say and conduct the case properly. 13 Cr. L. J. 299.

. If a lawyer has not fully acquainted himself with all the facts relating to the case and has noted them down in some particular order he is bound to leave flaws in examination-in-chief or cross-examination.

(i) A lawyer who was sometimes forgetful, having been engaged to plead the cause of an offender, began by saying: 'I know the prisoner at the bar, and he bears the character of being a most consummate and impudent scoundrel.' Here somebody whispered to him that the prisoner was his client, when he immediately continued: 'But what great and good man ever lived who was not slandered by many of his contemporaries.' This saved the situation? 80 M. L. J. 18 (Eng.).

(ii) In order that a lawyer should thoroughly prepare a case, he ought to have a good memory and great reflection. The intellectual faculties should be capably enriched by indefatigable industry and in season study; with the most extensive ideas of sensation and reflection, with memory, invention and genius, so as to be capable of arranging a variety of ideas in strict logical order. He must pursue with an ambitious zeal the various branches of collateral sciences, *i. e.*, medical, finger print, hand-writing, etc., and should study all, with experience.

(iii) Mr. Butler once asked his junior to prepare brief of a lady's case and give him till the next morning when he was to leave for Washington. The junior sat up half of the night and prepared the brief. Next morning the General asked him to show him the brief. The junior replied "I have the brief prepared. I have the points all in my head, and can state them to you in three minutes." "Let me have the brief" again said the General sharply. "But" said the junior "I left the brief at home on my table. However, as I have said, I have all the points of the case in my head." "Young man" said the General, "the next time you have a brief to prepare for me, bring me the brief and leave your head at home on the table". See P. L. R. 1908, Journal Portion, p. 40.

(iv) Mr. Butler spent a week in the repair shop of rail road, part of the time with coat off and hammer in hand, ascertaining the capabilities of iron to resist—a point on which his case turned.

Some people think that a volley of questions in cross-examination are simply due to the ingenuity of the cross-examiner. They do not realise that the cross-examining Counsel has devoted a good deal of time in preparing it after marshalling facts of the case as well as the surrounding circumstances. It is interesting to examine the steps which a lawyer takes in preparing a cross-examination and the source from which he draws his information. Much of the preliminary work is done in his office although some of the questions may be the result of nervousness and particular behaviour shown by the witness in the witness box. Preparation of cross examination is not an easy task. It is advisable for the Counsel to employ a Junior to do the investigating work. Particularly in preparing a criminal case he must not undertake to prepare for which a detective would be better suited. Even while the trial is going on and the witness is being examined by his own Counsel, the cross-examining Counsel should be preparing the cross-examination. I have experienced many cases where the witness is being examined by a

witness during the examination-in-chief gave rise to a particular theory or hypothesis on which the ground work of a successful cross examination was built. In preparing the cross examination of a witness the following points must be borne in mind.

(1) The history of the witness must be thoroughly scrutinised. Sometimes the previous trial records afford a wealth of information which must be assembled for working a hypothesis to be used in cross examination.

(2) The Counsel must interview his client and take from him a complete statement of all the pertinent facts which he remembers.

(3) The interest and the animosity of the witness and the motives which actuated him to become a witness should also be carefully kept in view.

(4) The lawyer must also interview all the available witnesses and take statements from them. This will obviate the effect of any change of mind a witness may have because of monetary or other inducement. It is not against the professional ethics or etiquette if the version given out by the witnesses are written out carefully and signed by them, in the chamber of the counsel.

(5) If an expert is coming forward as a witness his cross examination must be prepared with reference to textbooks. Even the aid of another expert will not be out of place. There are many cases on record where lawyers spent more time in Bar Libraries than in the court room for preparing the cross examination of the case of their clients. In the famous trial of Ernest Fritz, a New York taxi driver who was charged with the murder of Florence Cohen, the theory of the prosecution was that the accused had brutally murdered the woman during intercourse by raping her female organ, that caused the hemorrhage and death. The defence was that the accused had normal intercourse with the girl and the death resulted simply due to an unfortunate accident. Fallon who was defence counsel realised that his client's life depended upon his cross examination of these experts. He collected some 482 Gynecological text books, rejected over three hundred of them after a casual reading and carefully studied the contents of 182 books, and the story is told that he mastered the contents of these books in one night and practically committed to memory four standard works on the subject. The story may be exaggerated but the fact remains that as a result of this intensive preparation he bearded the experts in their den. Fallon showed complete mastery over the subject of uterine hemorrhage. When the case was finished, one of the experts remarked to him in amazement "Mr. Fallon, I did not know you were an M. D. when did you get your Degree." "To this Fallon replied dryly but truthfully: "I received my degree last night. I began practice this morning." The result of the case was obvious. The verdict was found in favour of the taxi driver. Lord Russell of Killowen was also unique in the matter of preparation of the case. He employed 12 Juniors. A client entered his library and to one of the men he remarked: "Is the whole Library working for Russell," "Yes" was the reply. "There are twelve of us doing the work of one man in order that one may do the work of twelve."

A lawyer has sometimes to do the work of a detective to obtain material for his cross examination and emulate Sherlock Holmes. A young girl brought a suit for personal injuries alleged to have been caused out of an assault by the accused while he was drunk. In order to prove her resulting disability, she stated that she had been confined to her bed continuously for a month immediately preceding the trial. Her tearful eyes and her coquettish behaviour in the court would have resulted in a verdict in her favour but the lawyer employed a number of detectives to shadow her movements before the trial. They reported her activities in minute details. The cross-examination began as follows:

Q. Now Miss La Verne, how did you spend your time last Thursday evening?  
A. I was in bed of course.

Q. Did you have anything to drink? A. No, I did not. My doctor told me not to.

Q. Do you know Percival Apjohn? A. Why, yes, I do.

Q. Did you see him Thursday night? A. No, I don't entertain in my bedroom.

Q. Now, tell the jury frankly, Miss L Verna, weren't you with Apjohn at the Golden pheasant Cafe last Thursday evening? A. Well, I guess I was but I—

Q. you danced there until 2 A. M, didn't you? A. No answer.

Q. you had eight cocktails, didn't you? A. No answer.

Q. you sat with Mr. Apjohn, the third table from the floor, did you not?  
A, yes.

Thus it was fully established to the satisfaction of the Jury that she had been visiting Cafes and Restaurants. To her cost she realised that she had erred somewhat in her claim to complete disability. Consequently her case entirely collapsed.

As already indicated the preparation of a case is not only made in the office or through detectives but in the court room itself. Most of this preparation is made with information obtained from witnesses and from their behaviour in the witness box. Every motion even involuntary, every word he uses and his general conduct in the witness box may afford basis on which a hypothesis may be built, which may ultimately destroy the adversary's case. Hence a witness must realise that he will be keenly watched and will be under close surveillance of inquisitive and determined lawyers who are waiting patiently for the word, gesture or involuntary change of expression which will betray him. It is the duty of the Counsel to prepare the witness for his cross examination. The witnesses are not conversant with the atmosphere of a court room particularly in our modern courts. They are not used to a bullying cross examination. It is advisable that the witnesses should be taken to the court room itself a few days before the day when he is to give evidence. This will abviate any first night buck fever which might seize him and ruin his testimony. He should also be told that the Judge has got a privilege to ask questions from the witness. He should be warned that if he is puzzled by a question he should demand that the question be repeated to him and thus he will get time for thinking. The common trick employed by some lawyers is to ask the witness whether he had repeated this story to any one. The witness very often blurts out that he did not talk the matter over to anybody. The Counsel makes a capital point out of it, and in arguments denounces his testimony by saying that the Counsel who produced him as a witness did not know that he was a witness to the occurrence. The cross-examination is generally to this effect:

Q. you talked this story over with the plaintiff or his attorney, did not you? A. No Sir.

Q. Whom have you talked to about this case and about what you saw there in the alley? A. No one.

Q. After you saw what happened in the alley, whom did you tell about it? A. Not a soul.

Q. You mean to say that you never told a single soul about what you saw in the alley that night? A. No, sir.



Q. Tell the jury then how counsel for the plaintiff knew that you could testify to anything about this case and why you were subpoenaed here.  
 A. Of course, there is no answer to this question.

### Preparation in Criminal Cases

In my vast and varied experience of criminal trials and criminal appeals I have noted with regret that several cases bear the imprint of non-preparation. The result of the case would have been quite otherwise, if preparation had been made on scientific and methodical lines. Some criminal lawyers are obsessed with the idea that criminal law is nothing but common sense, of which they have abundant store and study of case law on the subject is a sheer waste of time. One such case occurred in my presence several years ago. The lawyer practising on the criminal side believed more in pomp and show and pomous words. His idea as to how to become successful criminal lawyer was to entertain the police officials, to be friendly with zaildars and lambardar and occasionally to give party to the Magistrates. He thought that books and digests were useless. One day, he was questioned by a junior counsel thus : "A strikes B with a *sela* (instrument with or pointed spike) in the stomach, causing an injury  $\frac{1}{4}$ " "deep and B dies after three days due to blood poisoning caused by the dirty end of the instrument. What is the offence committed?" Now the countenance of the leading lawyer began to change and in a confused manner began to say : "The offence may fall under S. 304 or S. 326 or possibly S. 324 I. P. C." when pressed hard with volley of questions about the injury being caused on the vital part by a piercing weapon, he blurted out that it might amount to murder punishable under S. 302. Such is the condition prevailing amongst many lawyers. Those who are entrusted with the life and liberty of subject for a fee should not play with their life but rather give a good account of themselves by giving them all possible legal help. To them, I will say that law is not a bed of roses. It is a jealous mistress and must occupy most of your time.

The following hints may prove useful for preparation of a criminal case :—

1. Study first information report carefully and find out the omission of names of accused or witnesses, the delay in making it, the improvement made in the story, the part assigned to each accused, the favourable points in the F. I. R. on which theory of Right of private defence, provocation, accident mistake of fact or any other defence can be developed.

2. Study the *challan* or final report under S. 173 Cr. P. C. carefully. Majority of lawyers treat this important document as merely a matter of form or surplusage. "The concise statement of fact" in entry No. 9 in the *challan* is the chief pivot on which the whole prosecution revolves. If there is a defect in the *challan*, no amount of credible evidence can secure conviction against your client. What are fatal defects *See* :

(For law on the subject of *challan* see Prem's law and method of Police Investigation 1947 Chapter 26.)

3. Analyse the Medical Certificate and Postmortem report. Find out whether injuries described therein could be caused by the weapons which your clients are alleged to be armed with. It is a common fallacy amongst Doctors, Magistrates and Lawyers that they treat cutting of bone as grievous hurt. According to the definitions of grievous hurt fracture of bone is grievous injury and not merely cutting of it.

4. Tabulate the interest of P. W's, whether they are friends or relations of complainant or enenical to your clients. History of each witness must be traced.



5. Study the time and place of occurrence,—whether there was sufficient light or opportunities for identification, whether the prosecution has shifted the scene of occurrence and with what object.

6. Always obtain the copies of the statements of witnesses to police under S. 162 Cr. P. C. in advance and note the discrepancies in their statements *inter se*.

7. See, how far you can go with the prosecution and at what point should bifurcate and prove your defence.

8. See, how far your defence evidence will fit in with the circumstances alleged by the prosecution.

9. Study the chemical examiner's report thoroughly and find out what advantage you can derive from it.

10. Carefully plan out the statement which the accused has to make. A number of good cases have been lost by making indiscreet statements under s. 342 Criminal Procedure Code. Isn't it preposterous for accused to plead alibi or ignorance about the incident, when he bears as many as half dozen injuries on his person and unimpeachable liable evidence implicates him in the crime? It is for the lawyer to advise him to plead right of private defence and take full advantage of the injuries sustained by him in the fight. To say "no" to all questions put to him is only a deplorable legacy of the advocacy in the past, and sooner it is done away with the better.

#### CHAPTER 4

#### How to Become a Successful Cross-examiner

In order to be successful in cross-examination a counsel must have a thorough knowledge of the affairs of the human life and peculiarities of particular classes and communities. He should always think himself to be a student of law and never entertain an idea of being self-sufficient, because it has long been observed that the most un-informed in every science and art are in general the most confident and self-sufficient. This is also the case of pretender to legal knowledge, no case is too intricate or difficult for them. They can handle all sorts of complicated cases though the result is disastrous. Men of unlettered ignorance usually pride themselves with imagined practical experience, or on what is aptly termed "false fact" and blindly pursue the same erroneous system.

On receiving his diploma he is most anxious for fame and thinks the world ought to be extensively aware of his qualifications of practice. He, however, speedily discovers that the world esteems him as student and that he is not a more important individual than he was the day or month he received his qualification. He speedily discovers that clients will not consult him. Some suppose him inexperienced and too young, others have their own legal advisors, and always prefer practitioners of standing. He thinks that his youth is great or invincible obstacle to his success and he sighs for the time in which the public would reward him for all the labour and expenses he has incurred in the study of his art. Little does he know that every other member of the profession had the same difficulties to contend with and only surmounted them by time, attention, skill and exceptional morality. He does not know that a successful lawyer has deprived himself of all the pleasure, recreation or amusement and is always engaged in his study. The young lawyer should always take it as his motto that law is jealous mistress and more time he devotes for the preparation of the cases and the study of the law in that branch of the case, the more confidence he will acquire and the more successful he will be. If his fame be founded on talent and merit it regularly increases without an artificial help—it enlarges as it progresses. *Vires acquirit eundo.*

"A successful advocate must be a voracious reader, at least at the beginning of his career and an indefatigable worker. Lord Eldon said that in order to become a great lawyer one should 'live like a hermit and work like a horse.' The subject of law covers a vast field and the advocate must try to master the general principles of every branch of law. Without this knowledge he will not be able to strike upon the particular points which may be necessary to deal effectively with an individual case. It is a mistake to suppose, as some people are sometimes heard to say, that previous study is not necessary as the number of Digests and Reports or text-books now-a-days being numerous, the necessary knowledge can be gathered at the moment when a particular point crops up. Such books cannot be usefully consulted, and appropriate references cannot be found out, unless good use has been made of them by previous study. Further, unless the advocate has a thorough grasp of the leading principles of the law on the particular point, reference in text-books or digests are likely to mislead him and he may stumble upon cases which really go against his contention. The advocate has to deal mainly with human nature and the acts of men. A man with a deep knowledge of human nature is bound to turn out a successful advocate whatever his calling in life may be. Common sense is another virtue which is a passport to success in every profession. The greater the common sense, the greater the chance of success at the Bar. There may be an element of chance or what is commonly known as luck and opportunities may occur in a man's life which when taken at the tide will make him famous. But I should think that a man who has not equipped himself with the ingredients that are necessary to bring success in a profession, will not always be able to take full advantage of the opportunities when they come to him. Lord Sinha was asked often and often what it was that made for success at the Bar and he could only answer,—“I don't know.” He says: “I always come back to my first answer that it is difficult to know what it is that ensures success at the Bar. There is a good deal of chance in it—a good deal of what we call luck, but I should be sorry to think that success is purely accidental, and that the Bar is, like marriage, a big lottery.”

The subject-matter of litigation being of infinite variety, an advocate should try to have knowledge of every branch of learning. A very good knowledge of law only will not enable one to win laurels at the Bar. Nothing is more helpful in the profession than general culture. Interesting knowledge on a variety of subjects can be gathered by regular reading of newspapers and periodicals of different kinds. The latest scientific discoveries and achievements can be learnt by such reading. Scientific and technical knowledge is of great use. Many cases cannot be properly dealt with and witnesses cannot be cross-examined without a knowledge of medical jurisprudence, physiology, criminology, political economy, principles of engineering, book-keeping, electoral laws, rules of meeting, mercantile usages, finger impressions, handwriting, and a host of other things. In short a successful advocate should be a man of wide culture and study. Mr. K. D. Stalland in an article in the *Minnesota Law Review*, Vol. 14, p. 41, writes: “The work is intensely interesting; no two days are ever the same; the active lawyer is constantly having new experiences. He is daily acquiring new knowledge about a great variety of things. During the average week he probably learns why stucco cracks; how bricks are made; what the ingredients of a certain chemical compound are; what the cause of John Doe's insanity was; what may be the ultimate results of a certain disease; what started John somebody on a career of crime; what the history of a certain well-known business enterprise has been; the real inside story of how Joe Jackson actually made his money; what a really noble character so and so is; and what a detestable crook the sweet-smiling someone else is; what is actually the book value of the common stock in the Whoozis

Company ; and on top of this he probably hears the confidential outpourings of a story of actual fact that would make many a book of fiction look decidedly anæmic."

In order that he may plead successfully, the advocate must have a thorough grasp of the facts of his case and this can be acquired only by a diligent study of the cause he undertakes. These facts are to be gathered from the statement of the client's case, the evidence at the trial and the surrounding circumstances. They are the foundations of his argument. He draws his inferences or conclusions from them and builds his own theory on them. If the contest is fought solely upon questions of fact, he cannot expect to put his client's case in the best light unless he is a master of them. If it is a question of law, he must get at the principles of law which support his point of view.

It is not enough to cram the brain with the evidence and the facts of the case. The advocate must crystallize them by thought and chalk out a plan for presenting them in the best possible manner. A mass of undigested materials will confuse him and he is sure to falter at every step and bungle if they are not assorted and arrayed beforehand. Lucidity of expression follows lucidity of thought. Unless the mass of materials are properly investigated and arranged, the address is bound to be incoherent and unimpressive. He must eliminate the strong points from the weak, sift the truth from the untruth and unfold his arguments clearly and logically. Facts or circumstances that shed real light on the matter in controversy can only be found out by close investigation and when the irresistible points are discovered, they should be utilised to their fullest extent by skilful arrangement. The manner of presentation of the facts is no less important than the knowledge of facts. The faculty of presenting a case in the best form is one of the secrets of success in advocacy and it can only be acquired by perseverance and experience.

Great courage, independence and presence of mind are essentially necessary to make a successful advocate. A timid person will never shine at the Bar or win the confidence of the client and the Judge. Witnesses have broken down, unexpected difficulties have cropped up, things look black from every quarter—and yet the advocate has to keep his head cool and rehabilitate himself and regain the lost ground by coping with such extraordinary situations. The tide has to be turned back by devising a remedy from the resources of the moment. Mr. W. R. Riddle in an address before the American Bar Association spoke of courage thus : " This courage is not the courage of a prize-fighter, nor of the bully, but is the courage that will tackle every problem or question presented ; investigate it ; find out the whys and wherefores, the ins and outs, the pleasing features as well as those that are disagreeable, and then stand by your guns, Cowardice is only the result of ignorance, as Emerson says. " The lawyer who is armed with the facts, with all their bearings, and who is capable of applying the law to the satisfaction of his judgement, is thrice armed with a weapon that his adversary will fear."

" Our doubts are traitors, and make us lose,  
The good we oft might win by fearing to attempt."

" The great defect with too many who join the profession is that they are indolent and indiff-rent in their investigation, not only as to the facts, but as to the law. Many of them like to lean on older or more capable lawyers. Many like to succeed through the flattery of the Judge or suavity which is better expressed by the term *blarneying*, or by eloquence,

But where one succeeds through such methods, hundreds fail. For true success at the bar can only be attained by satisfactory knowledge of the facts and the law " (quoted in Aiyar's Professional Ethics, pp 139-140).

In a recent article in the Strand Magazine Lord Birkenhead summarises the equipments of an advocate thus :—(1) He who would persuade others should (if it is by any means possible) believe in the cause he pleads (2) In legal matters this counsel of perfection is not always attainable, therefore he must do his best without it (3) Before he begins to speak, he must completely understand his thesis and the order and logic of his presentation. (4) He must present it with every gift of rhetorical art with which his education and cultivation have equipped him. Sympathy, humanity, irony, invective emotion; all will contribute congruously to the evolution of the technique of the perfect orator. Such a one can easily be conceived of one who has inherited great natural gifts, such a one will not do justice to those gifts unless he reinforces them by intense study of the facts of every problem which he examines and unless he has learned them quality by a close and zealous study of the masters of the classical and English advocacy as expressed both in written and in spoken eloquence. (5) " And one other of practical advice may be added, I have laid stress upon the importance of careful preparation. To beginners this advice is of the first importance. But of course it must be realised that men are often called upon to make important speeches in circumstances which render elaborate preparation impossible. The art of spontaneous debate throws a speaker upon the resources of the moment. How far he succeeds will depend upon the readiness of his tongue and wit; but even more upon the value and substance of that which is stored in his mind. Whilst therefore, I advise young men to think out beforehand all their important speeches, I counsel them equally never to neglect upon occasions less critical, the practice of extempore speech. The art must be acquired, and can be acquired of thinking aloud with as little embarrassment and little confusion as one thinks to himself." See Sarkar's Modern Advocacy.

All lawyers have to labour hard and have to undergo great ordeal in the beginning. Even Lord Sinha had his days of depression and anxious waiting. In a recent newspaper article entitled "My First Brief" he says of himself: "When I began I had not got any University degree, I had not passed the final examination for the Bar, easy as it was, I had never been inside the chambers of any practising barrister or solicitor for practical training and therefore knew nothing of the practical application of law, I had never been a member of nor taken part in any debate in any debating society either in India or in England. It is difficult therefore to conceive of a man starting his career at the Bar with more inadequate equipment than I did. And now when I come to look back these many many years and consider the rashness of a man so ill prepared, starting life at a place where he did not know a single judge or barrister or solicitor, where he and his family were totally unknown, at my rate unknown to persons who matter so far as the business of barrister was concerned—I can only wonder at his audacity.... Things did not look cheerful when I stepped into the Bar Library in November 1880. The Calcutta Bar was then the most crowded Bar in India and there were giants. But there was besides a huge number of unknown juniors mostly Indian, who had been struggling for twelve or fifteen years and the Bar Library but had not succeeded in making any impression. These latter were the men with whom I came most in contact and they all impressed on me that here there was little chance for a friendless stranger like me,

The prospect as I said was desperately cheerless ; but there was nothing else to do, for I did not know anything else which I could do. And thus began the cheerless and almost hopeless, waiting at the Bar Library in the company of more than a hundred equally hopeless members of the learned brotherhood." In the same article he describes the terror and nervousness he felt and how he made a mull of his first case which was however an *ex-parte* one. A young articled clerk in an attorney's office named Jadav Chandra Chakravarty who had been in the same class with him in the Presidency College and who afterwards became one of the cleverest attorneys but died young, came to him and offered a brief. Lord Sinha says : "He came to me one day afternoon with an undefended brief marked with the usual fee of two gold mohus (34 rupees) and what was usual—14 rupees in cash. In those days it was almost unknown for an attorney to send such a brief with cash to a junior, who generally would have to wait till the next Pooja vacation to get his fees, if he got them at all. So the brief to me was doubly welcome, welcome not merely because it would give me the chance of opening my lips in Court but also because of the cash which accompanied and which was sorely wanted. Do you think I was elated ? Do you think I was burning with desire to make an eloquent speech ? Nothing of the kind. It was stark naked fear that took hold of me—fear that I would not be able to get the decree which the attorney wanted—fear that unfamiliar as I was with practice and procedure and the art of speaking in Court, I was about to damn my whole future for the sake of 34 rupees badly though I wanted them. Anyhow I went home that evening happy with my first fruits but at the same time in mortal dread of the morning of Monday when I should have to appear in Court. Monday came and I was in my place in Court at the Bar with my small brief, every line of it marked in the blue and in red and every word of it burnt into my memory in letters of fire. How different this from the days when my attorney's one anxiety was to make certain that I had untied the red tap of my brief before I actually appeared in Court for the case ! The Judge was Mr. Justice Trevelyan—himself a member of the Calcutta Bar not many years before—a kindly amiable soul who in his time helped many a lame dog over the stile. The case was called on in due time and I got up with my brief "ready," because I had got it up by heart. "My Lord," I said, "this is a suit on a promissory note in respect of money lent in the following circumstances."

"What is the service," interrupted the Judge. I had not the least idea of what his Lordship meant and so I went on to finish the sentence I had begun, trying to relate when, how and in what circumstances the money had been lent. But the Judge was not listening, for, by that time he had finished reading the affidavit of service of summons, the most essential thing in an undefended case as I soon learned, and finding that it was "personal service" to which no exception could be taken, he told me as I was floundering along, "Call your witness." Again I was at a loss. I did not know what I was to do, whether I was to ask my attorney to bring his witness who might or might not be behind me or whether I was to ask the court-peon to oblige me by getting hold of my witness and making him come to the box. But apparently I had nothing to do in the matter, for as I looked behind for help to the attorney who was standing behind me, the witness was already in the box. The attorney told me "Put your question." But before I could do so, the Judge himself had handed over the promissory note annexed to the plaint to the witness and asked him, "Was that signed in your presence by the defendant ?" and the witness gave his answer. Before I could say anything, the Judge

asked him further "What amount is now due for principal and interest?" and the witness having given his answer the Judge again took the bit between his teeth and said "Decree for rupees so much for principal and so much for interest etc." He turned to me and said "That's all Mr. Sinha," and I knew with relief that the case was over. So, that is my experience of the first case I conducted in Court, if it can be said at all with any truth that I conducted it. I left the Court thinking that I had so conducted myself that there would be little chance of a second case for me. But apparently it was not an unusual experience because my friend the articulated clerk came round to me afterwards and said "You see now how easy it is and I am sure you will feel more happy when I come to you with the next brief." But it was a long long time before the second brief came, and longer still before I felt a reasonable degree of confidence in myself." Quoted in Sarkar's *Modern Advocacy*.

The first duty of an advocate is that he should be a gentleman. He should not be quarrelsome and fall foul of the Bench, and forget his duty to others. It was Macaulay who once said of the paid advocate, that a man had only to put on a wig and he could say and do with impunity for a guinea which no gentleman would permit himself. It is the instincts of a gentleman and the respect for his profession that will protect an advocate from allowing himself to be made a tool in the hands of his client when cross-examining witnesses, to credit. Cockburn, L. C. J. said: "The way in which we treat our witnesses is a national disgrace and a serious obstacle, instead of aiding the end of justice." "In Court, in his office, in society, at home, let him never forget that he is a gentleman, and that he belongs to a highly honourable profession, the dignity of which he must sustain. Let him be sure that no word escapes his lips which he would not repeat in the presence of the most genteel company, and by being thus guarded in conversation, he will acquire an elegant style, undisfigured by common or coarse expressions, which will be of incalculably great advantage to him in the practice of the law, especially in the conduct of cases in Court, in the argument of cases and in the examination of witnesses" (Hardwicke, p. 459).

All round honesty and integrity are virtues which have a very high place in the legal profession. They give strength to an advocate and enable him to earn a reputation which inspires confidence in the tribunal and the client. Honesty does not mean uprightness only in money transactions. Suppression of the real situation of a case from the client in order to make him fight for personal gain, acceptance of more briefs than one can attend to when cases are called on for hearing in Courts, a hint conveyed to a witness, through a leading question, coaching a witness are but a few instances of dishonest dealings. A departure from the path of honour and integrity can never lead to good results. Conviction that he is espousing a right cause, gives the advocate power. A guilty conscience unnerves him and makes him stumble at every step. Rufus Choate, one of America's greatest advocates, once said: "I care not how hard the case is—it may bristle with difficulties—if I feel that I am on the right side, that case I win." Man has an innate sense by which he can discern right from wrong and it is not at all difficult for an advocate to find out when a client approaches him with a fabricated case. It is always a safe rule to keep the witnesses on the solid ground of truth. See Sarkar's *Modern Advocacy*, p. 54.

Cross-examination is generally considered to be the most difficult branch of the multifarious duties of the advocate. Success in the art as some one has said, comes more often to the happy possessor of a genius for it. Great lawyers have often failed lamentably in it, while marvellous success has crowned the efforts

of those who might otherwise have been regarded as of a mediocre grade in the profession. Yet personal experience and the emulation of others trained in the art, are the surest means of obtaining proficiency in this all important prerequisite of a competent trial lawyer. It requires the greatest ingenuity; a bit of logical thought; clearness of perception in general; infinite patience and self control; power to read men's minds intuitively, to judge of their characters by their faces, to appreciate their motives ability to act with force and precision; a masterful knowledge of the subject matter itself; on extreme caution; and above, all the instinct to discover the weak point in the witness under examination. *See Wellman on the Art of Cross Examination p. 22-23.*

A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self control. If you show by your face how the answer hurt, you may lose your case by that one point alone. How often one sees the cross examiner fairly staggered by such an answer. He pauses, perhaps blushes, and after he has allowed the answer to have its full effect, finally regains his self possession but seldom his control of the witness. With the really experienced trial lawyer, such answers, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened or even perhaps give the witness an incredulous smile, as if to say, "Who do you suppose would believe that for a minute?" *See Wellman on the Art of Cross examination pp. 28-29.*

Cross examination is one of the chief arts in the science of advocacy. Without its aid, the most astute lawyer is powerless, whilst a person who rightly obtains renown for his skill therein, becomes a terror to lying witnesses and by exposing perjury and falsehood, obtains success in the larger majority of his cases. The golden rule is to combine completeness with shortness. A good cross examiner instinctively discovers the weak points in the testimony of a witness, whilst the unskilful practitioner gropes in the dark; and though the latter may at times reveal the truth, it is rather the result of accident than of design, and his questions as a rule tend to confuse himself and the Court far more than the object of his attack. It is essential to confine the witness to the point under question, a matter of some difficulty owing to the fact that the questioner is often perturbed with a multiplicity of thoughts, either at the time of putting his question or immediately afterwards, or owing to the desire of the witness to avoid the question or to introduce some extraneous matter. To avoid this danger, it is necessary to exercise deliberate reflection upon every question you put. They should be framed distinctly in your mind and their bearing should be considered before you put them to the witness. It is advisable too when such a plan is feasible, as for instance, when your instructions make you master of the situation, to place yourself momentarily and mentally in the position of the witness. For this enables you to have a clear conception of the situation and while you may continue the attack coolly and collectedly the liability to be diverted from the point of view at issue will be to a large extent minimized. The calm judgment you exercise under such circumstances, will enable you to notice with great clearness any flaws in the evidence of the witness and to detect his attempts to avoid or conceal matters which he may consider dangerous or to take refuge in subterfuges. By retaining in your mind a short analysis of the issues raised or a condensed list of what you consider to be the main points of the dispute, you will avoid the danger of floundering about and thus encumbering the record with irrelevant matter. *See Advocacy by Morrison pp. 95-96.*

#### CHAPTER 5

### How and Where to Begin the Cross-examination.

As a general rule, subject to such very rare exceptions as scarcely enter into



your calculations, you should begin your cross-examination with an encouraging look and manner. Remember that the witness knows you to be on the other side; he is prepared to deal with you as an enemy; he anticipates a badgering; he thinks you are going to trip him up if you can; he has more or less girded himself for the strife. It is amusing to mark the instant change in the demeanour of most witnesses when their own counsel has resumed his seat, and the advocate on the other side rises to cross-examine. The position and the countenance, plainly show what is passing in the mind. Either there is fear, or more often defiance. If you look fierce and stern, it is just what had been expected, and you are met by corresponding acts of self-defence. But if, instead of this, you wear a pleasant smile, speak in a kindly tone, use the language of a friendly questioner, appear to give him, credit for a desire to tell the whole truth, you surprise, you disarm him; it is not what he had anticipated, and he answers frankly your questionings."

In the cross-examination of a witness, where should you begin? What order should you follow? Should you carry him again through the narrative given in his examination-in-chief, or begin at the end of it and go back-wards, or dodge him about, now here, now there, without method? "Each of these plans has its advantages and perhaps each should be adopted according to the special circumstances of the particular case." "But you cannot determine which course to adopt, unless you have some definite design in the questions you are about to put. A mere aimless, haphazard cross-examination is a fault every advocate should strenuously guard against. It is far better to say nothing than to risk the consequence of random questions which may as often wound your friends as your opponents." See Wrottesley on the Examination of Witnesses, pp. 106-107.

There are two kinds of cross-examination, one *actual cross-examination* and the other *apparent cross-examination*. "An actual cross-examination goes into all the facts with determination and energy, is persistent and minute, while an apparent cross-examination is one that avoids the material points of the testimony, and is in reality an evasive examination designed to escape the dangers of an actual one. An apparent cross-examination keeps off on the edges and fringes of the case, while an actual cross-examination goes into the strongest parts. The one is employed where there is danger in attacking the strongholds, and a feint that will draw attention to other points is the object designed to be accomplished. The other is employed where there is a real assault upon the veracity of the witness as well as where it is the object of the examiner to show that the witness is mistaken, or to reveal his motives, show his ignorance, or bring out his statements for contradiction. Where there is danger of doing harm by examining on really important matters, and yet it is felt that there must be something like an examination, lest it be concluded by the jury that the testimony is confessedly too strong to be met, an apparent cross-examination is proper and expedient. Such an examination should keep away from the points of danger as much as possible, and yet it must not appear to be an idle or unmeaning procedure. (Work of the Advocate, pp. 288-289).

The chief difficulty of a counsel is where to begin and how to begin the cross-examination. No hard and fast rule can be laid down regarding the point from which the cross-examination should begin. Sometimes you have to start your cross-examination with collateral matters and sometimes with the point at issue directly. Never begin your cross-examination with the weak point. The reason for that when you come to think of it, is very apparent. When a cross-examiner gets up to put his question, the witness is more or less nervous. In many cases he has been told, "Oh wait until John Smith or James Jones the eminent K. C., gets hold of you, he will turn you inside out in three minutes." Well, Mr. Jones, gets up and the witness has some apprehension, he is a bit



nervous, he is unused to your tone of voice, and there is a complete and sudden change of style, in the method of cross-examining from the method of examination-in-chief. There is no time at all for him to get his evidence in mind, and the first moment that you strike the weakest point of testimony under these conditions you strike when he is least prepared for it, because, in a few minutes, even a nervous witness will re-gain his confidence, and he feels you are not such a tremendous man after all, that you cannot turn him inside out, that you cannot smash him, and that he can hold his own fairly with you, you ask him the same question in fifteen minutes after he has become prepared, and he has every thing in his mind, he says "Yes or no," and "I will explain that to you" and he will explain at once, whereas if he had been attacked in the first place, and you caught him just at the moment when the sudden change occurred between the methods of examination, you might have got the answer that you were seeking, and very likely a true answer, because when a witness has time to think, knowing that he is a witness there in favour of the man who calls him, naturally and without any malevolence or without any wrong-doing on his part, his mind intuitively and unconsciously gets a sudden twist or turn that is very difficult to straighten out. 11 Cr. L. J. 81.

### Illustration

"Never begin your case with your weak points, *i.e.*, the points on which you could be proved to be false. That will prejudice the Court against you. This was an action for damages against a Railway Company for injuries caused by the alleged negligence of the Company. Two years before this trial the same case had been tried, and the Jury had disagreed. Hence the new trial.

A working man travelling on the defendants' line between Wapping and Shoreditch met with an accident through alighting unnecessarily at Whitechapel. His case was, that before he had time to alight, the train started, and he was thrown on to the platform, receiving serious injury to his knee. Months after the first trial there was a second, with the same result. This, therefore, is the third trial of facts that would come before a Court of Justice. In such cases against a railway company as a rule every presumption, at starting, is against the company. Negligence is nearly always assumed, and contributory negligence ignored; when it is not, the two negligences become so irretrievably entangled in the summing up that it would take a logician of the finest water to draw the necessary distinctions.

Another cause for such a presumption is this. Unfortunately companies, as a rule, are only able to call witnesses who are in their employ, and therefore whose evidence is open to some amount of distrust; the persons often have the strongest motives to give evidence on the part of their employers, in order to shelter themselves from blame. Starting with such presumptions in his favour, the plaintiff's counsel should have easy work in getting a verdict in favour of his client. But in this case the plaintiff's counsel began with his weak points. "The trains," said he, "on this line are always an hour late"—a statement that every Juryman knew to be untrue. How then could anything else be received without

from an hour late for all trains to forty minutes between Whitechapel and Liverpool Street. I would observe that these errors were merely errors of judgment in stating them, so far as the learned counsel was concerned, but they were of a more serious character on the part of those who instructed him. This second statement might have been true and by no means improbable; but the counsel's fault was in not ascertaining that it was not only untrue, but capable of being absolutely proved so. And this is the proof. The train travelled only a mile and a quarter in five minutes. Four minutes were always allowed in timing the trains, because they

had generally to wait some time outside the terminus before they could draw up. In this particular instance, however, it happened that there was no obstacle to the train running in, which it did. The three minutes, therefore, were not made up by accelerated speed.

Two false points were thus disposed of, as well as the probabilities to which they gave rise, a serious matter for the plaintiff, as it reflected on all his subsequent evidence.

Next, the plaintiff would swear, (so the learned counsel said), that he went to work seventeen weeks after the accident, but for eight weeks could earn only twenty-two shillings a week. This was another false point, which was more unpardonable than the others, because on the previous trials the plaintiff swore that he was as well as ever, and earned the same money as before.

Looking at the evidence-in-chief, we shall see how poor a thing it seems alongside of that brought out by the cross-examination. The plaintiff ceased work at half-past three, and waited for a companion till between four and five. He lived near Shoreditch Station, and was to meet his wife at Whitechapel to go shopping. He had been drinking with companions one of whom was drunk. He himself was sober. His drunken friend did not leave him.

Against this evidence, witnesses were called who had not been drinking. The plaintiff who was to meet his wife at Whitechapel, took his tickets for the station beyond. The inference therefore was, either that he forgot the appointment at Whitechapel, or that the appointment was untrue.

Next his wife never went to Whitechapel.

One cannot help asking why this useless story was told which had nothing to do with the case. It was to account for a fact which he could not account for at all, or did not choose to account for. The value of it to the defendants, although worthless to the plaintiff, was that he had given a false reason for his conduct, because he was afraid of the true one. It showed that having booked for Shoreditch, he suddenly resolved, as the train started, to alight at Whitechapel. Of course the plaintiff had to admit in cross-examination that he made no inquiry about his wife at Whitechapel, that when at the hospital he asked the nurse whether he was sober on the night of the accident, to which she answered, "No, you were under the influence of drink." The result is clear verdict for the defendant Company. Harris, p. 48.

The subsidiary rule is that you should not put material questions straight away. Cross-examination being a duel of intellect, you have to veil your object from the witness.

### Illustrations.

"If you are desirous of getting an answer to a particular question, *do not put it directly*. The probability is that the witness will know your difficulty and avoid giving you exactly what you wish. If not altogether straightforward (and for such witnesses you should always be prepared) he will be on the alert, and unless you circumvent him will evade your question." "A series of questions, not one of them indicative of, but each leading up to the point, will accomplish the work. If the fact be there, you can draw it out, or if you do not so far succeed, you can put the witness in such a position that from his very silence the inference will be obvious. One of the greatest cross-examiners of our day advised a pupil in cross-examining a hostile witness upon a point that was material, to put ten unimportant questions to one that was important, and when he put the important one to put it as though it were the most unimportant of all. And when you have once got the answer you want, leave it. Divert the mind of the witness by some other question of no relevancy at all. There is

no occasion to emphasise an answer while the witness is in the box, if the question be properly put. The time for that will come when you sum up or reply. If the witness sees from your manner that he has said something which is detrimental to the party for whom he has given his evidence, unless he be an honest witness he will endeavour to qualify it, and, perhaps, succeed in neutralising its effect. If you leave it alone, it may be that your opponent may not perceive its full effect until it has passed into the region of comment." See Harris, pp. 57-58.

"The line of opening questions should be remotely related to the subject and the witness should not be allowed to perceive the object in view. All suspicions in the mind of the witness should be allayed, so that he may be taken completely off his guard. The skilful cross-examiner may sometimes beguile a hostile witness into relating a version of the transaction which is wholly inconsistent with that told by him upon his own direct examination or which is entirely at variance with what has been previously related by another witness called by the adverse party. In either case, the purpose of the cross-examination has been accomplished, the witness has either contracted himself or else has discredited the evidence of his fellow-witness. The adversary will be then put in the dilemma of explaining away the contradictions of his own witnesses." 14 Cr. L. J. 20.

As an illustration of the rule it may be stated that it is a dangerous thing to ask men if they have feelings of any enmity or any bias against another. To such a question witnesses invariably answer: "No, we had a few words, but I am very friendly with him, and I would do him a good turn, he and I are not just close friends, we are friendly enough." You will sometimes get a woman who will be vindictive against her fellow-women, but there has rarely been a case where a man in the witnessbox has acknowledged that he was living at enmity with the litigant in the suit. 14 Cr. L. J. 88.

"Never risk under any circumstances an important question that is objectionable in form." 11 Cr. L. J. 79.

"There is the old theory, never ask a question unless you are sure of the answer, but that would destroy a good deal of cross-examination. That is not the way in which I put it. I put it rather that no counsel should ever risk an important question unless he knows and feels the question is proper and right in its form, having regard to form only. I will tell you why this is a dangerous thing, counsel on the other side are waiting for an opportunity at every turn to ease off their client if he is in the hands of a skilful cross-examiner. Counsel gets up very often and objects; he is asked what is your objection? 'Well, I object to the form of the question.' It may or may not be a good objection, but you have defeated, by your objectionable form of question, that which you have been labouring to obtain for 15 minutes or half an hour. How did you do it? The witness has stopped, but he has heard the question, and he is given a moment or two of thought, and he knows what you are driving at, no matter how cleverly you have put it. And by the time you get back to the question, the witness has got his 'wind,' and you get your answer, favourable of course to the opposing party." 11 Cr. L. J. 79.

## CHAPTER 6

### Rules of Cross-Examination

The subject of cross-examination is one of very great importance in the conduct of law cases because it deals with the separation of truth from falsehood and enables the Court to be seized of all the circumstances of the case bearing upon the issue. It brings out bias, detects falsehood and shows the moral and

mental condition of the witnesses. It corroborates your client's version of the issue or weakens your adversary's case. It has been said, that to a great extent, cross-examination is intuitive like music and painting, and whilst the amateur beginning his music or painting may not be very successful, yet he can achieve perfection by training, practice and experience. There can be no hard and fast rules for the cross-examination of witnesses. Different kinds of witnesses require different treatment. A few types of witnesses have been dealt with separately in the following pages. Cross-examination is a mental duel between the counsel and the witness and therefore, a counsel has to adopt a number of tactics to elicit truth from the witness.

David Paul Brown who was a member of Boston Bar published "*A Forum*" in 1856 and has laid down nine "Golden Rules for the examination of witnesses" which are reproduced below :

*Rule I.*—Except in indifferent matters, never take your eye from that of the witness ; this is a channel of communication from mind to mind, the loss of which nothing can compensate.

*Rule II.*—Be not regardless of the voice of the witness ; next to the eye, this perhaps is the best interpreter of his mind. The very design to screen conscience from crime—the mental reservation of the witness—is often manifested in the tone or accent or emphasis of the voice.

*Rule III.*—Be mild with the mild, shrewd with the crafty ; confiding with the honest ; merciful to the young, the frail or the fearful ; rough to the ruffian and a thunderbolt to the liar. Bring to bear all the powers of your mind not that you may shine, but that virtue may triumph, and your cause may prosper.

*Rule IV.*—In a criminal, especially in a capital case, so long as your case stands well, ask but few questions, and be certain never to ask any, the answer to which, if against you, may destroy your client's case unless you know the witness perfectly well, and know that his answer will be favourable, or unless you be prepared with testimony to destroy him, if he play traitor to the truth and your expectations.

*Rule V.*—An equivocal question is almost as much to be avoided and, condemned as an equivocal answer. Singleness of purpose, clearly expressed, is the best trial in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by the light of truth, or if by cunning, it is the cunning of the witness, and not of the counsel.

*Rule VI.*—If the witness is determined to be witty or refractory with you, you had better settle that account with him first, or its items will increase with the examination. But be careful not to lose your temper ; anger is always either the precursor or evidence of assured defeat in every intellectual treat.

*Rule VII.*—Like a skilful chess-player, in every move fix your mind upon the combinations and relations of the game ; partial and temporary success may otherwise end in total and remediless defeat.

*Rule VIII.*—Never undervalue your adversary, but stand steadily upon your guard ; a random blow may be just as fatal as though it were directed by the most consummate skill, the negligence of one often cures and sometimes renders effective the blunders of another.

*Rule IX.*—Be respectful to the Court and to the Jury, kind to your colleagues, civil to your antagonist, but never sacrifice the slightest principle of duty to an overweening deference towards either. See Chapter on "Behaviour of Counsel and Judge."

### Subsidiary Rules

Besides these there are some subsidiary rules which will also help the counsel in the difficult task of cross-examination.

**Rule 1.**—"Never commence cross-examination of a witness without the best preparation and without posting yourself with all the necessary details concerning the witness and the point on which he would be called upon to depose." 11 Cr. L. J. 77. See separate chapter on "Preparation of Cross-examination and Examination-in-chief."

**Rule 2.**—"Always attack the witness whom you are cross-examining in the weakest point at the opening, unless it is some complicated matter involving long accounts or something of that kind." 11 Cr. L. J. p. 82. Always attack him where he is least prepared. *Ibid.* See separate chapter "How and Where to Begin Cross-examination."

**Rule 3.**—"Do not begin with your bad witnesses. Begin with your best."

**Rule 4.**—"Do not cross-examine a witness merely as to character severely. Never attack a man's character unless you have a record of it." See separate chapter on "Character of Witnesses."

**Rule 5.**—"Do not make too much of immaterial discrepancies. The cross-examination for immaterial discrepancy in conversation is generally useless," (for explanation of this rule, see chapter on "Discrepancies.")

**Rule 6.**—"Do not examine a witness in a language which is much above the level of the witness. A counsel should always keep to the level of his witness." 11 Cr. L. J. 34. See separate chapter "Avoid Legal and Technical Expressions."

**Rule 7.**—"When the offence is only technical, do not cross-examine much. Want of cross-examination may be made up by argument."

**Illustration:—**(i) In a breach of promise case the defendant, Scarlett's client, had alleged to have been cajoled into an engagement by the plaintiff's mother. She was a witness on behalf of her daughter, and completely baffled Scarlett, who cross-examined her. But in his argument he exhibited his tact by this happy stroke of advocacy.

"You saw, gentlemen of the Jury, that I was but a child in her hands, what must my client have been?" 16 M. L. J. P. 174.

**Rule 8.**—"Try to reduce the gravity of the offence, when it is proved to the hilt." It is not always given to counsel to obtain absolute success. The offence charged against the accused may be a grave one and it may be fully and fairly proved. In such cases it would often be better for counsel to content himself with trying and reducing gravity of the offence in cross-examination.

**Illustration:—**The prisoner was indicted for the murder of his wife, and the principal evidence—if not the only evidence—against him of wilful murder was the deposition of the dying woman. Without this there would be no conviction for the capital crime: with it no defence. The statements in the deposition were closely compared and contrasted, when it was found that in many not immaterial particulars they contradicted one another; so the deceased wife gave some evidence in the prisoner's favour which no re-examination could affect. The deposition stated that the woman was "in bed had been to sleep, and was a little thirsty for drink; that her husband came and threatened to throw her out of the window, that he took a knife from a drawer, and said he would kill her. He then struck at her; she stooped, and afterwards found she was wounded. He said 'You have only a few hours to live,' and that he sent for a doctor and a policeman and gave himself up."

The woman's physical and mental condition were not such as enabled her to make a clear or connected statement. It might have been hers, but if not as to every word entirely hers, it was not her statement at all. There were pauses between the words as she spoke, and some of them on being examined were by no means proved to be the actual words uttered; only words to that effect.

Some seemed to have a double meaning, and, to equalize that surplusage of meaning, some had no meaning at all. So that taken altogether, this document was not in a fit condition to be relied upon, and was therefore rejected—cross-examined out of Court. But there was still the prisoner's "*confession*" to be relied upon: "*I have killed her.*" This was said to the policeman who apprehended him, or rather to whom he gave himself up. The following is a portion of the cross-examination of the policeman:

Q. "Did he say he was sorry?" A. "He did, Sir."

Q. "What did you say to him?"

In the circumstances this was a proper question; in others it might have been most dangerous. But the policeman was known to have been friendly with the prisoner; and besides his cross-examination was upon the depositions.

A. "I said to him, 'What, killed her, Jim?'"

"'Aye,' he answered; 'it is too true.'"

"It required little skirmishing after this. 'Killing' is not always murder."

The prisoner was proved to be a man of humane disposition, respectable and industrious; and the doctor's evidence was to the effect that it might even have been done unintentionally. A verdict of manslaughter was returned. See Harris, pp. 19—22.

**Rule 9.**—"If the witness is enthusiastic or exaggerating, allow him to exaggerate the matter until the exaggeration becomes apparently absurd. See separate chapter "Of Exaggerating and Enthusiastic witnesses."

**Rule 10.**—"Do not cross-examine a moderate witness severely."

**Illustration.**—An action was brought against a lessee for non-repair, and the witnesses for the plaintiff had proved a tolerably fair case, had shown a want of wind tightness and water-tightness, with other aggravated evils, sufficient to raise the expectations of any young counsel who could restrain his powers of cross-examination. In this case witnesses were called for the defence, and if a few immaterial questions had been asked in cross-examination, no harm would have been done to the plaintiff's case. There would have been a conflict of testimony, and the Jury would have given damages somewhere between the lowest estimate of the defendant and the highest claim of the plaintiff. Instead of that the enterprising counsel for the plaintiff proceeded to cross-examine in the following manner:

Witness for defendant had said that the house was in a fair state of tenantable repair. This was the cross-examination.

Q. "It was in a splendid condition, wasn't it?"

(Imagine such a question after the moderate statement of the witness. And imagine, if you can, that it is cross-examination). A. "I did not say it was in a splendid condition. I said it was in tenantable repair."

Q. "Then what has been said by the witnesses for the plaintiff is pure imagination?" A. "I don't know about pure imagination. I know it is a got up job." (*Laughter*).

Here, you observe, the witness, like a skilful arguer (and far too good for his opponent), limited his answer by appropriate terms. The Jury gave only the trifling damages which were admitted by the defendant himself. Harris' *Hints on Advocacy*, p. 302.

**Rule 11.**—"Do not press an unwilling or reluctant witness too much." It is a danger not to be lightly regarded, that of persisting in pressing a question upon a reluctant witness. "When you find a witness unwilling to give the evidence you seek, and you have drawn him as near to the point as there is any hope of

his being drawn or driven, it is always dangerous to attempt to urge him further. If you have nearly got an affirmative, and you press him over much, you may irritate him into giving you a direct negative. Harris' *Hints on Advocacy*, XIV Ed. 1911, p. 48.

**Rule 12.**—"Do not fish out unnecessary information in cross-examination. Never ask for more information from a witness under cross-examination, because, if you do, you are sure to get it to your cost." 11 Cr. L. J. p. 82.

**Illustration:**—A man who cross-examines well upon that which he knows, or has reason to believe he knows, or that he thinks exist, and who cross-examines well upon that point, is doing his whole duty to his client and to his solicitor, but the man who ventures into an unknown field, the man who goes without a lantern to his path will find that the first head that runs up against the tree is the head of the cross-examining counsel. That is so by the reason of the circumstances. I do not care who the witness is. Take the farmer from the plough, take the mechanic from the shop, and put him into the box and ask him to tell a story—these men, generally speaking, although they look simple, and they are simple in their ideas, and they are limited, perhaps in their knowledge of many things—these men in nine cases out of ten, make the very best witnesses. Why? Because they are generally familiar with all the ins and outs of the subject-matter, because they know the ways of living, the methods of life, the peculiarities of that kind of life, and they know what is likely to have occurred under a set of given circumstances. they are more familiar than the counsel. 11 Cr. L. J. p. 83.

**Rule 13.**—"Never begin to cross-examine a witness without purpose. Never put a question in cross-examination without being able to give a reason for it." See Harris' p. 58. The most difficult thing to learn in conducting the case is "What ought not to be done." Harris *Hints on Advocacy*.

**Rule 14.**—"No question should be asked without an object. The witness should not be interrogated aimlessly, and it is far better to ask too few than too many questions. The mistake is often made of bringing out additional evidence in favour of an opponent upon the cross-examination, without impeaching the witness's credibility." 14 Cr. L. J. p. 19. "It is a good rule *never to put a question in cross-examination without being able to give a reason for it.*"

"When you have once got the whole, remember that *you can have no more.*"

The first question which a cross-examiner has to put himself is whether he should cross-examine at all, whether there is anything which has been deposed to in the examination-in-chief against his client, which has to be set right in cross-examination. There ought to be no cross-examination merely for the sake of such examination. Many young barristers think if they do not cross-examine, they are showing their inability to conduct a case; that their clients will think little of them, and what not. A counsel who is worthy of the name will discard all such thoughts, and stand fast to what may be called the rules suggested by common-sense.

The most difficult thing to learn in conducting a case is, *what ought not to be done*. If you are not quite settled whether a particular question is to be asked or not, as a general rule, you must choose not to risk it. When in doubt what question to put in cross-examination, put none. Never run an unnecessary risk; and the case must be desperate where any risk should be run at all." See Harris—iv, introductory.

**Rule 15.**—"Stop cross-examination when you have got your point. Do not proceed further than necessary." 11 Cr. L. J. p. 81.

"There is danger in asking too much in cross-examination and it is infinitely better that we should ask too little than too much." 11 Cr. L. J. p. 82.

"Many cases are lost by lack of proper cross-examination, but more cases are lost by too much cross-examination." 11 Cr. L. J. p. 73.

"When you get your point keep it and don't let it go until you are thorough with it." 11 Cr. L. J. 73.

"Never cross-examine any more than is absolutely necessary. If you do not break your witness he breaks you; for he only repeats over in stronger language his original story. Thus you only give him a second chance to tell his story to them and besides by random question you may draw out something damaging to your own case." Wrottesley, p. 99.

"Don't begin to cross-examine upon any point unless you have good ground for gaining that point, and stop absolutely short when you gain it. Let me illustrate what I mean by that."

"A witness is called, and he is asked if he said a certain thing upon a certain occasion. In many, many cases, the answer of the witness is :

"No I don't remember that I did." He asks again: "Well, think it over; didn't you say so and so?" "I don't remember. I don't remember anything about it." Counsel goes about three questions further, and the man says: "No, I never said it." Now, that is a thing that happens in almost every trial. If counsel had been satisfied to take the want of memory, whilst it may have been against the contention of the counsel, it may not have been against his side of the case. It is infinitely better for counsel that a witness should not remember than that he should remember and swear point blank that he never said such a thing. 20 M. L. J. pp. 360—370. For illustrations regarding this rule see separate chapter on "Unnecessary and Reckless Cross-examination."

*Rule 16.*—"Never put unnecessarily various questions in order to please your client". Where the object of the client is merely to gratify his passions by unmerited abuse, by embarrassing or intimidating witnesses, of whose veracity he has no real suspicion, or by conveying an impression of discredit which he does not actually feel, in all classes of this kind, there is an imperious duty upon the advocate, who, while the protector of private right, is also the minister of public justice, which requires them to be repelled.

*Rule 17.*—"Do not cross-examine in such a manner as to give room to an effective and damaging re-examination. Sometimes through small openings in cross-examination a large and effective re-examination may gain admittance. Harris' p. 107. For illustrations see separate chapter on "Re-examination."

*Rule 18.*—"Do not expect too much from your adversary's witness."

*Rule 19.*—"Never create impression in the mind of a witness that you are his enemy or that you distrust him, even if you have to elicit something unpleasant from him."

*Rule 20.*—"Bring out past history or some unfortunate incident in his life by some suitable apology or in a pleasant manner." Where it is for cross-examination counsel to inquire into the past history of a witness or to speak about the death of a near relative or dear friend, or to touch some chord of sorrow, or to make witness speak about something unpleasant for him to think or narrate, it is better to use introductory expressions of deploring the necessity of asking questions, and representing it as one of the unpleasant but imperative duties of counsel." See Cox's Advocate: Wrottesley, p. 73.

Cicero, in his defence of Cluentius, one of the charges against whom was that of having poisoned a son of one of the witnesses, shows how to approach an unpleasant subject like this. Referring to this charge, he says:—"I deny that this young man, whom you say died immediately after drinking from the cup, died on that day at all. It is a great and impudent falsehood. Look at



the facts. I say that he came to the dinner unwell, and with the imprudence of youth indulged too much at it ; that he was ill for some days after, and so died. Who is the witness that speaks to this ? he who mourns for his death, his father—his father, I say, who, from his paternal distress, would rise from the place where he is sitting to witness against Cluentius if he had the slightest suspicion of his guilt : he by his testimony acquits him. But, (addressing the father) stand up, I pray, a moment while, however painful it may be, you repeat this necessary evidence in the course of which I will not detain you long ; you have acted more righteously in not suffering our sorrow to favour a false charge against a man who is innocent." Cox's Advocate ; Wrottesley, p. 78.

**Rule 21.**—"Do not rush through your cross-examination." There is nothing more common with beginners than going too fast. They are frequently told by the Judge that they forget that he has to take down the answers. When the evidence is coming well, there is no doubt a great temptation to let it run too fast, but you must take care it does its proper work, otherwise it will be like a rush of water which shoots over the mill-wheel instead of turning it. Harris' Hints on Advocacy, p. 39.

Every material particle of evidence should be distinct, intelligible, and in its proper position, or your case will be imperfect as a whole. You had better, if you have a case at all, be too slow with a witness than too fast. Harris' Hints on Advocacy, p. 43.

Counsel are sometimes so impetuous in cross-examination that they put two or three questions in rapid succession without waiting for an answer, as though they were administering interrogatories. This is an exuberance of inquisitiveness which must be restrained if you really desire to cross-examine with success. Harris' Hints on Advocacy, p. 58.

**Rule 22.**—"If you get a favourable answer, do not get the answer to be repeated over again."

If an answer favourable to your side has been brought out in cross-examination, don't press the witness to restate ; you can comment upon it when you argue your case to the Jury. Hardwicke, p. 240.

Unless there be a doubt as to what an answer was, you do not require it to be given twice. "Let well alone," said a Judge to a junior who was so enamoured with a witness's answer that he must needs hear it again and again. There is also a danger of the witness varying his answer unconsciously if you ask him again and again. See Harris' Hints on Advocacy, p. 39.

You need not give him a second run for the purpose of going over the same ground again. Having got the answer you want, keep it and at once go off upon another point ; otherwise, if you ask him to repeat it for the purpose of directing attention to the good point you have made, he will qualify what he has said, and very likely unsay it altogether by some lying explanation. Give him no opportunity of wriggling out of what he has sworn. That is the business of your opponent, not yours. See Harris' Hints on Advocacy, p. 73.

**Rule 23.**—"Never cross-examine your own witness."

### Illustration

Before Mr. Justice Hawkins, not long since, a junior was conducting a case, which seemed pretty clear upon the bare statement of the prosecutor. But he was asked:

Q. "Are you sure of so and so ?" A. "Yes."

Q. "Quite ?" inquired the counsel. A. "Quite."

Q. "You have no doubt ?" A. "Well," answered the witness, "I have not much doubt because I asked my wife,"

Q. Mr. Justice Hawkins : " You asked your wife in order to be sure in your own mind ? " A. " Quite so, my lord. "

Q. " Then you had some doubt before ? " A. " Well, I may have had a little, my Lord. "

This ended the case, because the whole question turned upon the absolute certainty of this witness's mind. *See Harris' on Advocacy, p. 37*

A cross-examination of one's own witness may most unjustly bring about a disastrous result. A witness may get confused and although at first might feel absolutely positive, and be justly positive, yet, by perpetually harassing him, he may begin to doubt whether he is positive or not, and leave an impression that he is doubtful. Such questions as; " Are you quite sure, now ? " " Are you certain ? " are cross-examinations and do not fall properly within the scope of an examination-in-chief. *Harris' Hints on Advocacy, p. 38.*

*Rule 24.*—" Do not ask a question too broadly " You should avoid placing the whole point before the witness, otherwise you may get it denied in the lump. *Harris' Hints on Advocacy, p. 57.*

### Illustration

Q. " Were you present at the meeting of the trustees when an agreement was entered into between them and the plaintiff ? " A. " Yes. "

Q. " Will you be kind enough to tell us what took place between the parties with reference to the agreement that was then entered into between them ? "

This is an instance of verbosity, which shows that in putting questions, long-drawn sentences should be avoided. The more neatly a question is put the better, as it has to be understood not only by the witness but by the Jury. All that was necessary to be asked might have been put in the following words:—" Was an agreement entered into between the trustees and the plaintiff ? " " What was it ? "

It will appear even more strange that after the answer was given by one witness, which was all that was necessary to prove that part of the case, the question was repeated to another with additional verbosity. " Will you be good enough to inform us what took place upon that occasion between the parties, as nearly as you can, with reference to the agreement that was then, as you have stated, entered into between them ? Please tell us, not exactly but as nearly as you can in your own way what his exact words were. " *Harris' on Advocacy, p. 42.*

*Rule 25.* When a witness has given some evidence in your favour you should not discredit him by showing him unworthy of belief."

*Rule 26.*—" Do not ask questions in cross-examination at random without an objective point," 11 Cr. L. J. 74.

### Illustration

It is said of Sir James Scarlett, an eminent advocate and an accomplished cross-examiner:—" His questions were always pointed, directed to some purpose, and often hit the mark. In cross-examination he outstrips all that gave ever appeared in the British Bar, not perhaps in one single quality; for, while some have excelled him in strength and force, others have left him behind in craft. His superiority, however, as an accomplished cross-examiner, as combining the best qualities for the office and making the best use of them at the best time and to the best effect, must, on every hand, be admitted. His brow is never clothed with terror, and his hand never aims to grasp the thunderbolt, but the gentlemanly ease, the polished courtesy, and the Christian

urbanity and affection, with which he proceeds to the task, do definitely more mischief to the testimony of witnesses who are striving to deceive, or upon whom he finds it expedient to fasten a suspicion. He has often thrown the most careful and cunning off their guard, by very behaviour from which they inferred their security. Seldom has he discouraged a witness by harshness, and never by insult, and to put men upon the defensive by a hostile attitude, he has always considered unwise and unsafe. Hence he takes those he has to examine, as it were, by the hand, makes them his friends, enters into familiar conversation with them, encourages them to tell what will best answer his purpose, and thus secures a victory without appearing to commence a conflict," Wrottesley, p. 147.

*Rule 27.*—"Do not press a witness who refuses to answer a material question. A refusal to answer or an evasion of your question, will frequently be more serviceable to you than words."

On such occasions, when assured of the advantage with which you can employ in your argument to the Jury that reluctance to reply, you will not after having plied him fairly continue, to urge him; but having done enough to satisfy the Court that he can, if he pleases, say something more, you should withdraw and then you may suggest such inferences from his silence as may be most advantageous to your cause. It is a frequent and fatal fault of young advocates that they will have an answer in words to every question they put, forgetting that the answer may be injurious, while the silence may be more than suggestive of all that it is their design to elicit.

*Rule 28.*—"Do not put material question straightway. Always begin with immaterial questions."

If you are desirous of getting an answer to a particular question, do not put it directly. The probability is that the witness will know your difficulty and avoid giving you exactly what you wish. If not altogether straightforward and for such witnesses you should always be prepared) he will be on the alert and unless you circumvent him will evade your question. A series of questions, not one of them indicative of, but each leading up to the point, will accomplish the work. If the fact be there, you can draw it out, or if you do not so far succeed, you can put the witness in such a position that from his very silence, the inference will be obvious. One of the greatest cross-examiners of our day advised a pupil in cross-examining a hostile witness upon a point that was material, to put ten unimportant questions to one that was important, and when he put the important one to put it as though it were the most unimportant of all. Harris' Hints on Advocacy, p. 57.

The line of opening questions should be remotely related to the subject and the witness should not be allowed to perceive the object in view. All suspicions in the mind of the witness should be allayed, so that he may be taken completely off his guard. 14 Cr. L. J. p. 20.

The skilful cross-examiner may sometimes beguile a hostile witness into relating a version of the transaction which is wholly inconsistent with that told by him upon his own direct examination or which is entirely at variance with what has been previously related by another witness called by the adverse party. In either case, the purpose of the cross-examination has been accomplished, the witness has either contradicted himself or else has discredited the evidence of his fellowwitness. The adversary will be then put in the dilemma of explaining away the contradictions of his own witnesses. 14 Cr. L. J. 20.

There is the old theory, never ask a question unless you are sure of the answer, but that would destroy a good deal of cross-examination. That is not the way in which I put it. I put it rather that no counsel should ever risk an

important question unless he knows and feels the question is proper and right in its form, having regard to form only. I will tell you why this is a dangerous thing, counsel on the other side are waiting for an opportunity at every turn to ease off their client if he is in the hands of a skilful cross-examiner. Counsel goes up very often and objects; he is asked, what is your objection? 'well, I object to the form of the question.' It may or may not be a good objection, but you have defeated, by your objectionable form of question, that which you have been labouring to obtain for 15 minutes or half an hour. How did you do it? The witness has stopped, but he has heard the question, and he is given a moment or two of thought, and he knows what you are driving at, no matter how cleverly you have put it. And by the time you get back to the question, the witness has got his "wind," and you get your answer, favourable of course to the opposing party. 11 Cr. L. J. p. 79.

*Rule 29.*—"When you secure some points in cross-examination leave it and divert the mind of the witness by some other questions of no relevancy at all." Harris' Hints on Advocacy, p. 58.

*Rule 30.*—"Do not argue with the witness. Avoid being led into an argument with the witness."

To argue with a witness is not only to abandon your high post of vantage but to make a bad impression on the Jury. You are no longer the advocate, but are reduced to the level of an ordinary disputant with a person who will probably be too much for you. Argument is not cross-examination; the time of incubation is not yet. You will be able to see what you will make of the evidence by and by; at present it is your duty, by questions, to get as much as possible in your favour, or to destroy as much as possible that which has been given against you. Your argument, if worth anything, will be better addressed to the Jury than to the witness; and they will possess this advantage, that then there can be no correction or explanation by the witness. Harris' Hints on Advocacy, p. 75.

### Illustrations

(i) At the end of a long but unsuccessful cross-examination of a plaintiff an inexperienced lawyer once remarked, "Well, Mr. Whittmore, you have contrived to manage your case pretty well." "Thank you, counselor," replied the witness, with a twinkle in his eye, "perhaps I might return the compliment if I were not testifying under oath."

(ii) Mr. Curran once asked a witness: "There is no use of asking you questions, for I see the villain in your face." "Do you, Sir?" replied the witness with a smile. "I never knew before that my face was a looking-glass." Well men, p. 128.

(iii) Whenever a cross examiner enters into arguments with the witness he usually finds himself in a hot soup. Argumentative cross examination is most dangerous specially when the witness is acquainted personally with the eccentricities and oddities of the lawyer.

In a divorce case a lawyer was trying to prevent a divorce from being obtained against his client on the ground of habitual drunkenness. One of the plaintiff's witnesses stated that the client was more often intoxicated than sober. The counsel began to argue with the witness regarding the precise degree of drunkenness which had been ascribed to his client. The cross examination was as follows:

Q. Now, Sir, I must ask you again for the proper information of the Court, as well as my own, as to the drunkenness of my client. You say you have seen him drunk a great many times. How often have you seen him drunk? A. Almost every time I saw him.

Q. How often was that ? A. Well, I didn't keep account of the times, but I should say at least once a week at all events.

Q. Only once a week, eh ? Well, that is truly moderate. And how drunk was he then. A. Well, it is impossible for me to say how drunk was he then ? A. well, it is impossible for me to say how drunk he was. How can I tell how drunk he was ? He wasn't sober, I know this well ; but as to how drunk, how can I tell how drunk a man was ?

Q. But you must tell, and we don't want your reflective philosophy. Now I ask you again, and I want a direct answer, how drunk was the defendant when you saw him only once a week ? A. Well, if I must make an answer, I would say the defendant was about as slipper drunk as you were the last time I saw you at the St. Charles bar on 3rd street.

(iv) In a suit or recovery of the price of the carpet a witness testified to details of the transactions although there was no written contract in existence. The Counsel began to argue with the witness thus :

But there was no written agreement for the sale of the carpet ? A. Well you don't have a written agreement when you buy a loaf of bread either, do you ?

Q. But you don't cover the floor with a loaf of bread, do you ? A. Neither do you eat a carpet ; do you ?

An outburst of laughter greeted this exchange and the lawyer with a red face was forced to wave the witness aside and to make the best of the bad situation which he himself had created.

3.—The question for determination by the Court was whether the size of the cart was such that it could not be removed through the door without dismembering it. The Counsel persisted in arguing with the witness about the size of the cart.

Q. How big was the cart did you say ? A. Well, of the ordinary size ; about as big as other carts.

Q. But that won't do for an answer Mr. Witness. I want you to be more particular in your testimony. A. I can't be more particular.

Q. Well, sir, you must be more particular. A. Well, if I must be more particular I should say the cart in question was in its dimensions about the size of the sleigh you built in your cellar and couldn't get out of the door.

*Rule 31.*—"Do not go over in cross-examination the same ground as that covered in examination-in-chief." 11 Cr. L. J. 74.

*Rule 32.*—"Never ask a question the answer to which may be adverse to your case."

When there is any doubt as to whether you should put a question or not, the sound rule is not to ask the question at all.

There are so many ways of framing a question or a series of questions, that it would disclose a poverty of ingenuity indeed if you asked one that might involve the fate of your client. Harris' Hints on Advocacy, p. 56.

It has been said that you ought to hesitate very much to ask a really critical question at a critical moment in the case, unless you are reasonably sure of what the answer is going to be. 11 Cr. L. J. p. 79.

*Rule 33.*—"Do not cross-examine unnecessarily to obtain an explanation." Do not cross-examine for explanation unless the explanation is necessary for your case.

### Illustrations

(i) This piece of cross-examination was in a case where an *alibi* was set up. The charge was, "murder." It was alleged that the prisoner had slept, on the

night of the murder, in a cottage a great many miles away from the scene, and that he was in bed by a certain hour. The tenant of the cottage with whom the prisoner lodged was called by the Crown and said that the prisoner was not at home on the particular night. It was considered advisable to break her down in cross-examination, which was to this effect :

Q. "How do you say he did not come home that night ?" A. "Because I sat up."

Q. "But might he not have come in and you not have heard him ?" A. "He could not."

Q. "You might have been asleep ?" A. "I was not asleep."

Q. "How long did you sit up without going to sleep ?" A. "Until four o'clock in the morning."

Q. "How do you know he did not come in while you were asleep ?" A. "Because I looked in his bedroom to see if he had been in and his bed had not been slept in."

There was nothing more to be asked. Counsel for the accused could not have expected to gain anything by these explanations.

(ii) In a case of murder a witness was pressed in the following manner with the following result:—In this case the question was, to what sex the deceased belonged.

Q. "Do you mean to say you know the deceased by her clothing ?" A. "Yes, I know every garment she wore."

Q. "But do you mean to say you know the deceased person was the woman ?" A. "Yes."

Q. "How do you know her?" A. "By her features." Sentence : Death.

(iii) In a case of murder, in which a witness had sworn to the body of the deceased by certain work which he had done to the dress in which the body was clad, the question was asked.

Q. "Do not all dress-makers sew pretty much alike ?" A. "Yes."

Q. "How, then can you say this work is yours?" A. "Because I know my work from everybody else's."

Referring to this Mr. Harris says : "I often wonder what the fascination is that leads so many counsel to ask a hostile witness. How do you know that ? 'Why do you say that ?' "

"How ?" "Why ?" "Wherefore ?" "What is the reason ?" "What is your opinion ?" are a nest of snakes for the innocent beginner to lay hold of.

(iv) The following illustrations are well worth perusal:—This was a cross-examination of an intelligent Police constable.

Q. "Had you any reason, constable, for arresting the prisoner as you did for suspecting him, in fact ?"

A. That was' the straightforward way of putting it. Judge likes straightforwardness—Jury admires the young counsel's jaunty manner, and the Police constable likes to be dealt with without any attempt to circumvent him. But that is a very dangerous question for the accused. It would cost him his liberty.

Q. "Why did you suspect him ?" asked counsel.

A. "I knew he was one of the worst thieves we got."

Mark the impression that the question and the answer should have made upon the Jury. How any answer to such a question would benefit the accused, it is impossible to know. Harris' on Advocacy, xii.

*Rule 34.*—"Do not tell a witness again and again that he is on oath."

"Be careful to avoid contracting the habit into which an advocate is liable to lapse if he does not keep guard over himself at the beginning of his practice. Do not indulge too much in adjurations to witnesses to speak the truth reminding them continually that they are on their oaths, as "Now, Sir, upon your solemn oath," "Remember, you are upon oath, and take care what you say," and such like. If frequently introduced, they lose their force by repetition. They are very effective when judiciously employed, and uttered with a due solemnity of tone and manner and on fit occasions, but they should not put forward on every slight pretence as well to frighten an honest witness as to awe a dishonest witness. Reserve such an appeal for times when it may be used with effect, because, with obvious propriety, when you believe that a witness is tampering with his conscience you may sometimes successfully prevent the contemplated perjury by a solemn appeal, and especially if you add to it an exhortation not to be hasty in his answer, but to think before he speaks. The countenance, the tone of the voice, the very attitude, should express the language you utter. You may word it somewhat after this fashion: "Remember, you have sworn to tell the truth and the whole truth. Now (put the question, and add), think before you speak, and answer me truly as you have called God to witness your words." Cox's Advocate referred to in Wrottesley's Examination of Witnesses, p. 133.

*Rule 35.*—"Do not repeat questions in cross-examination. But sometimes by sheer repetition you unnerve a witness and get out truth from him." See separate chapter "Repeating Questions in Cross-examination."

*Rule 36.*—"If you can safely admit a fact do not put the other party to proof which the other party can easily prove."

*Rule 37.*—"Do not cross-examine a witness on unimportant details."

Assuming that you prove something by examination of particular details, ask yourself, "Now, if I prove that fifty times over, will that affect the judicial mind or will it affect the minds of the Jury who are finally disposing of this matter?" If it won't then drop it. Leave it out immediately. 11 Cr. L. J. p. 74.

"A poor Welsh woman leaving home to attend an annual meeting of the Methodists replied, on being questioned as to the numerical amount of the probable assemblage, that perhaps there would be a matter of four millions, this in a little open ground that, by no possibility, could accommodate as many thousands." See Hardwicke's Art of Winning Cases.

*Rule 38.*—"Do not lose your temper and never make exhibition of ill-feeling." Harris' Hints on Advocacy, p. 220.

In cross-examination it is important to eliminate any concern about your own case, because the moment you are thinking about what your case is or will be, or what effect the evidence will have on your case, your mind is distracted from a subject which requires singleness of eye and purpose, and singleness of mental action." 11 Cr. L. J. p. 78.

Mr. Wilde (afterwards Lord Penzance) when a Queen's counsel was a remarkable advocate, with the advantage of good presence and, unlike many eminent leaders, generally took a favourable view of a case before it came on, instead of suggesting difficulties. If he lost the verdict he would say: "We cannot always win." Harris p. 322.

"Never be bluffed out of Court, but do not begin the bluff," says Judge Donovan in his work entitled "Tact in Court," p. 113.

Once in Court, stay in, and be an opponent, as Shakespeare well describes through Polonius: "Beware of entrance to a quarrel, but being in, bear it that the opposer may beware of that." Tact in Court, P. 113. "Never show disappointment." 11 Cr. L. J. 79. Be forcible, firm, dignified and clear. Be bold and press a just claim of proper defence regardless of consequences, and do not exult on favourable answers."

On this subject, Cox says:—"At the very outset, let us warn you against exhibiting any kind of emotion during cross-examination; especially to avoid the slightest show of exultation when the witness answers to your sagacious touch, and reveals what apparently he intended to conceal. It startles him to self-command, and closes the portal of his mind against you more closely than ever. You have put him upon his guard and defeated yourself. Let the most important answer appear to be received as calmly and unconsciously as if it were the most trivial of gossip. In the same manner you may carry him to the conclusion of his story, and what with an explanation of one fact, and addition to another and a toning down of the colour of the whole, the evidence will usually appear in a very different aspect after a judicious cross-examination, from that which it wore at the close of the examination-in-chief."

*Rule 39.*—"Never attempt to distort facts in cross-examination."

"Nothing weighs as much with the tribunal, whether Judge or Jury than the act of counsel who seeks not to accept the facts with qualifications, but who seeks to distort the facts in order that the fact may mean something less or more than it should mean." 11 Cr. L. J. p. 75.

Cox says:—"It must be understood that, in all this, your only purpose should be to ascertain the very truth to trace an error if it exists to try the memory of the witness if it be trustworthy. Never should you seek to entrap him into a falsehood, nor by your art to throw him into perplexity, with a design to discredit him, if you believe that not only is he honest, but that he has not erred. Your duty as an advocate is strictly limited by the rules of morality. It is no more permissible for you to tamper with the truth in others, or tempt them to confound or conceal it than to be false to yourself. The art to be practised in cross-examination is to be used only when you really believe that the witness has not told the truth and it is your honest purpose to elicit it." Cox's Advocate cited in Wrottesley, p. 112.

"Never attempt to win the case by improper means. Always base your claim or defence on justice, equity and good conscience and not on mere technicalities." It has been said of Abraham Lincoln that "he had the ability to perceive with almost intuitive quickness, the decisive point in a case and the wisdom to throw away all the trappings, no matter how brilliant they might be, and cling to that one main point as a shipwrecked seaman clings to a lonely spur." In speaking to his partner Mr. Herndon, he said "If I can clear this case of technicalities, and get it properly swung to the Jury, I will win it." 13 M. L. J. p. 211.

General John H. Littlefield, who studied law under Mr. Lincoln tells this anecdote of him:—"All clients knew that, with old Abe as their lawyer, they would win their case, if it was fair; if it was not, that it was a waste of time to take it to him. After listening sometime one day to a would-be client's statement, with his eyes on the ceiling, he swung in his chair and exclaimed: "Well you have a pretty good case in technical law, but a pretty bad one in equity and justice. You will have to get some other fellow to win this case for you; I cannot do it. All the time talking to the Jury I would be thinking,



'Lincoln, you are a liar, and I believe I should forget myself and say it out aloud.' 13 M. L. J. p. 211.

"Much of the force of his argument," writes Judge Scotts, "lay in his logical statement of the facts of the case. When he held in that way secured a clear understanding of the facts, the Jury and the Court would seem naturally to follow him in his conclusions as to the law of the case. His simple and natural presentation of the fact seemed to give the impression that the Jury were themselves making the statement. He had the happy and unusual faculty of making the Jury believe they, and not he, were trying the case. Mr. Lincoln kept himself in the background, and apparently assumed nothing more than to be an assistant counsel to the Court or the Jury, on whom the primary responsibility for the final decision of the case in fact rested." 13 M. L. J. 212.

**Rule 40.**—"Never abuse your privilege as counsel." See ch. 7.

**Rule 41.**—"Do not appeal to the sympathy of the Judge or Jury too often." Sometimes counsels appeal to the Court that his client has a wife and a number of children and that there is nobody to support them in case of heavy sentence being passed on him.

### Illustrations

(i) In a case the Judge, addressing the Advocate, said :—Mr., let me hear no more of that kind of argument: your client has a right to his wife and three children, but he has no right to steal the plaintiff's property in order to support them." Haris' p. 91.

(ii) It is not often that Jury can be reached from the front in battle, and a flank movement may be better. A Western counsel made an appeal for the release of a young boy, charged with arson, a terrible offence, not clearly proven by this side illustration: "To a boy like this, life is little thought of, and punishment is hardly realised. He sits here as cold as marble. Brought in unironed and on bail, surrounded by some friends who love him, he has not yet learned to realise the consequences of an adverse verdict. The chief anxiety is to the other members of his family. To them his conviction would be worse than the grave. When the little Farrington boy was crushed to death the other day between two huge trucks and Dr. Eddy folded his broken body in his fatherly arms and carried it home, the scene was one long to be remembered. But the parting of a mother with a conviction to know that he is to linger in his youth ten or a dozen years in anguish is a far deeper sorrow. Sooner or later all home relations will be severed. Death with noiseless footfall comes in, seals up the doors of breath, puts out the light of the eyes, freezes the purple current of the veins, and we lay them: to rest for ever, and go away in sadness for a time: "but even death is not dishonour. It is not like consigning one to a living tomb not so dreadful, not so terrible in its consequences; and of all things to a Jury, the first and middle and last consideration is the consequences of their verdict." See Donovan's Tact in Court, pp. 39-40.

**Rule 42.**—"Be always ready with law and evidence.

"Make your own case by your own side's testimony. Stop when you get a ruling, make a point, or reach a climax. Let the other side kill their case by cross-examination if they care to, but leave such weapons to the unwary. Act with firmness; hate no one: learn to please in persuading; rely upon fair jurors. Clear testimony and intense energy with a thorough preparation." See Donovan's Tact in Court. See separate chapter "Preparation of Cross-examination.

**Rule 43.**—"Never interfere with the Judge if he begins to cross-examine. See separate chapter on "Cross-examination by Judge."

*Rule 44.*—"Do not attempt to effect the impossible in cross-examination."

Some counsel used to conduct cross-examination by the hour upon those facts which no man, not even the all-powerful Judge on the Bench, could shake an examination entirely devoted to attacking those particular facts. That is due to curious psychological condition arising from the very strength of the facts and the cross-examiner becomes irresistibly impressed with the idea that these are the things he must attack, the very things that a wise cross-examiner would fly from would not touch under any circumstances. 11 Cr. L. J. p. 74.

*Rule 45.*—"Lead the witnesses to absurd results." See separate chapters of "Exaggerating Witnesses," and "Lead the Witness to Absurd Results."

*Rule 46.*—"Do not make observations on the testimony while the witness is under examination."

### Illustration

Mr. Adolphus, cross-examining an alleged accomplice: "I think you told us some things then (Monday, at another trial for the same plot) that did not come to your recollection to-day?"

A. "That may be. I will not pretend to say that the next time I come up here I can communicate as I have done to-day."

Q. "Certainly not; there are people that proverbially ought to have a good memory?" A. "Yes, certainly." Q. "You make your evidence a little longer or shorter, according as the occasion suits." A. "Yes, I mention the circumstances as they come to my recollection."

Q. "This about the digging entrenchments you did not state on Monday?" A. "No, I forgot that."

Q. "The next time there will be a new story?"

Mr. Gurney: "I must interpose, my Lord."

L. C. J. Dallas: "All these observations are certainly incorrect."

Mr. Adolphus: He has said it himself, 'when next I come into the box, shall recollect other things,' and upon that I put the question, whether he would tell another story the next time he comes."

L. C. J. Dallas "Ask him the question if you wish it."

Mr. Adolphus: "Shall you tell us a new story the next time?"

A. "No. If anything new occurs to my mind when I come to stand here. I will state it." (1820) Ings' Trial 83 How. St. Tr. pp. 957—999.

### General Hints on Cross-Examination

1. "Avoid strengthening your opponent's case by eliciting answers that were omitted in examination-in-chief or which could not be asked in examination-in-chief."

2. When a reluctant witness is drawn as near to the point as there is any hope of his being drawn or driven, it is always dangerous to attempt to urge him further.

3. If a witness has a strong bias, you must lead him on until his bias becomes manifest and overpowering.

4. A strong interest weakens the side on which it lies; it will be proper to elicit this at the earliest opportunity and shown early in the cross-examination.

5. Never ask a question the answer to which may be adverse to your client.

6. If you are desirous of getting an answer to a particular question, do not put it. The probability is that the witness will know your difficulty, and avoid giving you exactly what you wish, and unless you circumvent him, he will evade your question.

7. Avoid putting a question which may make an opening for a flood of questions for your opponent.

8. Do not cross-examine for explanations, unless the explanation is necessary for your case." *See Harris' Hints on Advocacy.*

9. "Do not put the same question upon some important piece of evidence to every witness. If you have got the first contradicted by the second, let the matter rest; the next witness may make a guess, and corroborate the first, which will materially weaken the effect of the contradiction. By judiciously pursuing the line you may get all the witnesses to contradict one another. *See Wellman's Art of Cross-Examination.*

10. "Whenever you have once fairly caught a witness, do not sacrifice the advantage by exhibiting him too ostentatiously. You need not give him a second run for the purpose of going over the same ground again," *See Wellman's Art of Cross-Examination.*"

11. "Manner plays great part in advocacy. A question in one tone will induce an answer while in another it will not. An emphasis upon a particular word may produce a totally different version from that which would cause if laid upon another." *See Harris' Hints on Advocacy.*

12. "What is called a serious cross-examination when applied to a truthful witness, only makes the truth stand out more clearly, and unless counsel is able to arrive, in his own mind, at a satisfactory opinion, it is far better to ask nothing than to flounder on with the chance of getting out something by a crowd of questions. *See Life of Sergeant Ballantine, p. 126.*

13. "If a witness intends to commit perjury, it is rarely useful to press him upon the salient points of the case, with which he probably has made himself thoroughly acquainted, but to seek for circumstances for which he would not be likely to prepare himself." *See Life of Sergeant Ballantine, p. 126.*

"In concluding the remarks on cross-examination, the rarest, the most useful and the most difficult to be acquired of the accomplishments of the advocate, we would again urge upon your attention, the importance of calm discretion. In addressing a jury you may sometimes talk without having anything to say, and no harm will come of it. But in cross-examination every question that does not advance your cause injures it. If you have not a definite object to attain, dismiss the witness without a word. There are no harmless questions here: the most apparently unimportant may bring destruction or victory. If the summit of the orator's art has been rightly defined to consist in knowing when to sit down, that of an advocate may be described as knowing when to keep his seat. Very little experience in our Courts will teach you this lesson, for every day will show to your observant eye instances of self-destruction brought about by imprudent cross-examination. Fear not that your discrete reserve may be mistaken for carelessness or want of self-reliance. The true motive will soon be seen and approved. Your critics are lawyers; who know well the value of discretion in an advocate, and how indiscretion in cross-examination cannot be compensated by any amount of ability in other duties. The attorneys are sure to discover the prudence that governs your tongue. Even if the wisdom of your abstinence be not apparent at the moment, it will be recognized in the result. Your fame may be of slower growth than that of the talker, but it will be larger and more enduring." *See Cox's Advocate.*

## CHAPTER 7

### Abuse of Cross-Examination

It has often been noted that cross-examination is abused. It is used as an instrument of torture for the purpose of enabling the parties for eliciting the truth.

Evidence Act has prohibited the putting of defamatory or scandalous question or questions couched in offensive language. *See* Ss 149-150, Ev. Act.

The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form. *See* S. 152, Ev. Act.

“ It requires forensic and intelligence to make a right use of this great instrument for the discovery of truth. Whereas cross-examination is the most powerful weapon in the hands of an experienced advocate, it is very dangerous, although a very tempting one, in the hands of the novice. It is a double-edged weapon and as often wounds him who wields it, as him at whom it is aimed. But if cross-examination be a powerful engine, it is likewise an extremely dangerous one, and often recoils fearfully, even on those who know how to use it. The young advocate should reflect that if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth, that he is almost sure to recollect every material circumstance by which it was accompanied, and the more his memory is proved on the subject, the more of these circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses of immaterial circumstances, not likely to attract attention, or even slight discrepancy in their testimony respecting them, so far from impeaching their credit often rather confirms it. Nothing can be more suspicious than a long story told by a number of witnesses agreeing down to the minutest details. Hence it is a well-known rule, that a cross-examining advocate ought not, in general, to ask questions the answers to which, if unfavourable, will be conclusive against him, as, for instance, in a case turning on identity, whether witness is sure, or will swear, that the accused is the man of whom he is speaking. The judicious course is to question him as to surrounding or even remote matters, which may show that he is mistaken, that his memory is not good, etc.” *See* Best, S. 660.

### Fear of Cross-examination

“ Sometimes you get a witness who is thoroughly frightened. Women sometimes get frightened and they tell you they do not know what they do know, and they tell you this even when their want of knowledge seems to be fatal to their case. What shall you do with such a witness? You have to show by a course of cross-examination that the witness simply does not know what she is talking about.

“ Some years ago an eminent English counsel encountered just that difficulty. The witness said she did not know what she did know; if he did not know she could not recover. So he began to put a series of questions to her. ‘What day of the week is this?’ ‘I do not know.’ ‘What year is this?’ ‘I do not know.’ ‘What is your name?’ ‘I don’t know.’ Well it was now very apparent to everybody that the woman did not know what she was talking about. This exhibition saved her case.” *See* 12 M. L. J. 369-370.

Even men of the greatest ability and experience often dread the ordeal of cross-examination. A singular instance of this is given by Phillips in his work on “Curran and His Contemporaries.” Regarding the dread of Chief Justice Bushee to pass the ordeal of cross-examination by Lord Brougham, the author says:—“Never shall I forget the state of nervous excitement into which he worked himself on being summoned to give evidence before the Irish Committee in the House of Lords in 1839. I think I see him at this moment, as I saw him then, hawking his carpet bag full of documents up and down the corridors, now walking himself out of breath, now pausing to recover it, now eyeing the bag on which he much counted, and again gazing about in absolute bewilderment. At last in much perturbation he exclaimed: “The character of a witness is new

to me, Phillips. I am familiar with nothing here. The matter on which I come is most important. I need all my self-possession, and yet to protest to you, I have only one idea, and that is, Lord Brougham cross-examining me."

Turning the trial of the case of *Tilton v. Beecher*, in the cross-examination of Mr. Beecher, an orator and a pulpit preacher of the highest order, the cross-examining counsel found fault with the hesitancy of the eloquent and able divine in not answering his questions more freely and directly, and the reply made was: "I am afraid of you."

It is said of Garrick, the famous actor, that, when examined as a witness respecting the nature of a free benefit, he was incapable of giving an intelligible testimony. See Hardwick, p. 87.

In noticing these incidents as to the fear of cross-examination, Mr. Wrottesley says:—"If distinguished men like Bushee and Beecher and Garrick are frightened at the idea of submitting to cross-examination, what must be the feelings of delicate women and young persons who are sworn for the first time and who are unaccustomed to the publicity incident to the trial of a cause in one of our courts? How inexcusable, then, must be the conduct of the advocates who handle such witnesses roughly in their cross-examinations." See Wrottesley, pp. 101-102.

Great allowance is always made for a nervous witness, who invariably receives the sympathy of the jury. You have to guard, therefore, against offending that sympathy, as you undoubtedly would by a severe tone or manner. See Harris, p. 82.

From the time the average lay witness hears his name called by the Court orderly till he hears the welcome news, 'That will do, thank you,' he feels uneasy, he perspires, his pulse increases and somehow his nerves are not quite steady. Is all this necessary and unavoidable? The Court has ordered the witness to come at the expense of one of the parties, in order to tell it quietly and disinterestedly what he knows of a certain state of facts, or alleged facts. In theory the witness comes as a sort of friend to enlighten the Court with his knowledge. No ability, no punishment, no blot on his name will he incur, provided only he speaks and speaks truth. That is the theory; but the treatment meted out to the average witness in practice hardly conforms to it. The witness knows what he has to go through, and hence his overstrung nerves, his panting heart. In other words, the witness knows that as soon as he pledges his solemn oath, he will be regarded as fair game to be bullied and badgered by counsel for the opposing side, and sometimes too, by the counsel who called him, who seeks to make him, by hook or crook, and what is called the art of examination and cross-examination, tell a story favourable to his contention.

The witness is perfectly honest, but he is just an ordinary layman, unfamiliar with the ways of lawyers. The atmosphere of a law Court breathed from the bald elevation of the witness-box, acts on him like some stimulo-sedative drug, exciting his brain and dulling his faculty of memory. 4 M. L. J. p. 11.

Archbishop Whately strongly condemns this unfair treatment of witnesses by counsel. He says: "I think that the kind of skill by which the cross-examiner succeeds in alarming, misleading or bewildering an honest witness may be characterised as the most base and depraved of all possible employments of intellectual power. Nor is it by any means the most effectual way of eliciting truth. The mode best adapted for attaining this object is, I am convinced, quite different from that by which an honest, simple-minded witness is most easily baffled and confused. I have seen the experiment tried of subjecting a

witness to such a kind of cross-examination by a practical lawyer as would have been, I am convinced, the most likely to alarm and perplex many an honest witness, without any effect in shaking the testimony; and afterwards by a totally opposite mode of examination, such as would not at all have perplexed one who was honestly telling the truth, that same witness was drawn on, step by step, to acknowledge the utter falsity of the whole. Generally speaking, a quiet gentle and straightforward, though full and careful, examination will be the most adapted to elicit truth, and the manoeuvre and the brow-beating which are the best adapted to confuse an honest, simple-minded witness are just what the dishonest one is the best prepared for. The more the storm blusters, the more carefully he wraps round him the cloak which a warm sunshine will induce him to throw off."

### Illustrations

(i) A witness, John Jones, had been called. He was sworn and asked to say what he knew about the affair. A. "Nothing."

Q. "Nothing! Have the goodness to pay attention, Sir. You remember being in the Red Cow Inn on the 10th of last month?" A. "No, I don't."

The counsel handed the witness the depositions.

Q. "Is that your name?" A. "Yes."

The judge nodded to the barrister. "You may treat him as a hostile witness."

The barrister, having been given permission, began:

Q. "Mr. John Jones, you deny everything you have previously sworn. Have you been in the company of prisoner's friends since you last gave evidence?" A. "No."

Q. "I see. What did you have to drink before coming here?" A. "Nothing except tea."

Q. "Tea—ahem! a queer sort of tea. How many glasses of tea did you have?" A. "I had two cups."

Q. "Two very large cups, eh?" The witness turned to the judge. A. "My lord, why should I be insulted?" The judge intervened. "Of course not; nobody means to insult you, but . . ."

"My lord, I know nothing about this case. I am a juror in waiting."

It may be noted that the barrister had not the patience to see that there was probably some mistake, but immediately jumped to suggestions of bribery and drunkenness. It was not his fault. Sergeant Burfuz did the same sort of thing; but the Burfuz type is becoming extinct now, and so much the better. 5 M. L. T. p. 105.

(ii) A barrister, who had only just emerged from the solicitor's ranks, said to another solicitor, "If your man doesn't settle, tell him I shall ask him whether he doesn't eat his meals in the kitchen. I was articled to him and know all about him." 5 M. L. T. p. 105.

(iii) Some twenty-seven years ago, as the result of Sir Charles Russel's handling of one of the witnesses in the famous Osborne case, a loud outcry was raised against what was called the abuse of cross-examination. A long discussion in the London Times, in which aggrieved witnesses clamoured for protection from their forensic tormentor was relieved by a lively contribution from Sir Frank Lockwood, narrating an experience of his own cross-examining a witness at the York Assizes as to the exact position of certain cattle on a road, 'beasts' as they call them in Yorkshire.

Q. "Now my man," said Lockwood, "you say you saw these animals

clearly from where you stood, how far off can you usually see a beast?" A. The witness, looking critically at Lockwood across the Court replied, "just about as far off as I am from you." 8 M. L. J. 94=31 N. L. J. p. 110.

(iv) A lawyer in the province of Bihar attacked the prosecutor by way of so-called "Suggestions" involving dishonourable conduct. The Court should demand from the advocate an assurance that he has good grounds for making the suggestion. If the assurance is not received, cross-examination on those lines should be stopped promptly. If the assurance is given and it should appear at the termination of the trial that no such grounds existed, a tribunal should bring the conduct of the advocate to the notice of the High Court. 1930 P. 195.

"It may be remarked that a threat to ask the complainant in criminal trial scandalous or indecent questions unless he paid money amounts to extortion. See 9 P. 725.

(v) One of the glaring instances of the abuse of the privileges of counsel was the cross-examination of Russell Sage by the Hon'ble J. H. Choate in the famous suit brought against the former by W. R. Laidlaw. The facts of the case were as follows :

On the fourth day of December, 1891, a stranger by the name of Norcross came to Russell Sage's New York office and sent a message to him that he wanted to see him on an important business, and that he had a letter of introduction from Mr. John Rockefeller. Mr. Sage left his private office, and going up to Norcross, was handed an open letter which read, "This carpet bag I hold in my hand contains ten pounds of dynamite, and if I drop this bag on the floor it will destroy this building in ruins and kill every human being in it. I demand twelve hundred thousand dollars, or I will drop it. Will you give it? Yes or no?" Mr. Sage read the letter, handed it back to Norcross, and suggested that he had a gentleman waiting for him in his private office, and could be through his business in a couple of minutes when he would give the matter his attention. Norcross responded:—"Then you decline my proposition? Will you give it to me? Yes or no?"

Sage explained again why he would have to postpone giving it to him for two or three minutes to get rid of some one in his private office, and just at this juncture, Mr. Laidlaw entered the office, saw Norcross and Sage without hearing the conversation, and waited in the anteroom until Sage should be disengaged. As he waited, Sage edged towards him and partly seating himself upon the table near Mr. Laidlaw, and without addressing him, took him by the left hand as if to shake hands with him, but with both his own hands, and drew Mr. Laidlaw almost imperceptibly around between him and Norcross. As he did so, he said to Norcross, "If you cannot trust me, how can you expect me to trust you?"

With that there was a terrible explosion. Norcross himself was blown to pieces and instantly killed. Mr. Laidlaw found himself on the floor on top of Russell Sage. He was seriously injured, and later brought a suit against Mr. Sage for damages upon the ground that he had purposely made a shield of his body from the expected explosion. Mr. Sage denied that he had made a shield of Laidlaw or that he had taken him by the hand or altered his own position so as to bring Laidlaw between him and the explosion.

The Jury rendered a verdict in favour of Mr. Laidlaw of £ 40,000, which judgment was sustained by the General Term of the Supreme Court, but subsequently reversed by the Court of Appeals. The cross-examination of Mr. Sage by Mr. Choate is interesting, as an instance of what the New York Court of Appeals has decided to be an abuse of cross-examination into which, through their zeal, even eminent counsel are sometimes led. It also shows to what

lengths Mr. Choate was permitted to go upon the pretext of testing the witness's memory.

It was claimed by Mr. Sage's counsel upon the appeal that "the right of cross-examination was abused in this case to such an extent as to require the reversal of this monstrous judgment, which is plainly the precipitation and product of that abuse." And the Court of Appeals unanimously took this view of the matter.

After Mr. Sage had finished his testimony in his own behalf, Mr. Choate rose from his chair to cross-examine; he sat on the table back of the counsel table, swinging his legs idly, regarded the witness smilingly, and then began in an unusually low voice.

Q. "Where do you reside, Mr. Sage?" A. "At 506, Fifth Avenue."

Q. (Still in a very low tone). "And what is your age now?" A. (Promptly). "Seventy-seven years."

Q. (with a strong raising of his voice). "Do you ordinarily hear as well as you have heard the two questions you have answered me?" A. (Looking a bit surprised and answering in an almost inaudible voice). "Why, yes."

Q. "Did you lose your voice by the explosion?" A. "No."

Q. "You spoke louder when you were in Congress, didn't you?" A. "I may have."

Mr. Choate, resuming the conversational tone, began an unexpected line of questions by asking in a small-talk voice, "What jewelry do you ordinarily wear?"

Witness answered that he was not in the habit of wearing jewelry.

Q. "Do you wear a watch?" A. "Yes."

Q. "And you ordinarily carry it as you carry the one you have at present in your left vest pocket?" A. "Yes, I suppose so."

Q. "Was your watch hurt by the explosion?" A. "I believe not."

Q. "It was not even stopped by the explosion which perforated your vest with missiles?" A. "I do not remember about this."

The witness did not quite enjoy this line of questioning, and swung his eye-glasses as if he were a trifle nervous. Mr. Choate, after regarding him in silence for some time, said, "I see you wear eye-glasses." The witness closed his glasses and put them in his vest pocket, whereupon Mr. Choate resumed, "And when you do not wear them, you carry them, I see, in your vest pocket."

Q. "Were your glasses hurt by that explosion which inflicted forty-seven wounds on your chest?" A. "I do not remember."

Q. "You certainly would remember if you had to buy a new pair?"

If the witness answered this question, his answer was lost in the laughter which the court officer could not instantly check.

Q. "These clothes you brought here to show, you are sure they are the same you wore that day?" A. "Yes."

Q. "How do you know?" A. "The same as you would know in a matter of that kind."

Q. "Were you familiar with those clothes?" A. "Yes, Sir."

Q. "How long had you had them?" A. "Oh, some months."

Q. "Had you had them three or four years?" A. "No."

Q. "And wore them daily except on Sundays?" A. "I think not; they were too heavy for summer wear."



Q. "Do you remember looking out of the window that morning when you got up to see if it was cloudy, so you would know whether to wear the old suit or not?" A. "I do not remember."

Q. "Well, let that go now: how is your general health, good as a man of seventy-seven could expect?" A. "Good except for my hearing."

Q. "And that is impaired to the extent demonstrated here on this cross-examination?"

The witness did not answer this question, and after some more kindly inquiries regarding his health, Mr. Choate began an even more intimate inquiry concerning the business career of Mr. Sage.

He learned that the millionaire was born in Verona, Oneida County, went to Troy when he was eleven years old, and was in business there until 1868, when he came to this city.

Q. "What was your business in Troy?" A. "Merchant."

Q. "What kind of a merchant?" A. "A grocer, and I was afterwards engaged in banking and railroad operating."

Mr. Sage, as a railroad builder, excited Mr. Choate's liveliest interest. He wanted to know all about that, the name of every road he had built or helped to build, when he had done this, and with whom he had been associated in doing it. He frequently outlined his questions by explaining that he did not wish to ask the witness any impudent questions, but merely wanted to test his memory. The financier would sometimes say that to answer some questions he would have to refer to his books, and then the Lawyer would pretend great surprise that the witness could not remember even the names of roads he had built. Mr. Sage said, "Possibly we might differ as to what is aiding a road. Some I have aided as a director, and some as a stockholder."

"No, we won't differ; we will divide the question."

Mr. Choate said:—"First name the roads you have aided in building as a director and then the roads you have aided in building as a stockholder."

The witness either would not, or could not, and after worrying him with a hundred questions on this line, Mr. Choate finally exclaimed, "Well, we will let that go."

Next the cross-examiner brought the witness to consider his railroad-building experience after he left Troy and came to New York, whereby he managed, under the license of testing the memory of the witness, to show the Jury the intimate financial relations which had existed between Mr. Sage and Mr. Jay Gould, and finally asked the witness point blank how many roads he had assisted in building in connection with Mr. Gould as director or stockholder. After some very lively sparring the witness thought that he had been connected in one way or another in about thirty railroads.

"Name them!" exclaimed Mr. Choate. The witness named three and then stopped.

Q. (Looking at his list). "There are twenty-seven more."

"Please hurry,—you do business much faster than this in your office."

Mr. Sage said something about a number of auxiliary roads that had been consolidated, and roads, that had been merged, and unimportant roads whose directors met very seldom, and again said something about referring to his books.

Q. "Your books have nothing to do with what I am trying to determine, which is a question of your memory."

The witness continued to spar, and at last Mr. Choate exclaimed, "is it not true that you have millions and millions of dollars in roughs that you have not named here?"

All of the counsel for the defence were on their feet, objecting to this question, and Mr. Choate withdrew it, and added, "It appears you cannot remember, and won't you please say so?"

The witness would not say so, and Mr. Choate exclaimed, "Well, I give *that* up," and then asked, "You say you are a bank-r; what kind of a bank do you run,—is it a bank of deposit?"

The witness said it was not, and neither was it a bank for circulating notes. "Sometimes I have money to lend," he said.

Q. "Oh you are a money-lender. You buy puts and calls and straddles?"

The witness said that he dealt in these privileges.

"Kindly explain to the Jury just what puts and calls and straddles are," the lawyer said encouragingly.

The witness answered: "They are means to assist men of moderate capital to operate."

Q. "A sort of *benevolent* institution, eh?" A. "It is in a sense. It gives men of moderate means an opportunity to learn the methods of business."

Q. "Do you refer to puts or calls?" A. "To both."

Q. "I do not understand." A. "I thought you would not."

Mr. Choate affected a puzzled look, and asked slowly: "Is it something like this: they call it and you put it? If it goes down they get the enchargeable benefit, but if it goes up you get it?"

A. "I only get what I am paid for the privilege."

Q. "Now, what is a straddle?" A. "A straddle is the privilege of calling or putting."

"Why," exclaimed Mr. Choate, with raised eyebrows, "that seems to me like a *game of chance*."

A. "It is a game of the fluctuation of the market."

"That is another way of *putting* it," Mr. Choate commended looking as if he did not intend the pun. Then he asked, "The market once went very heavy against you in this game, did it not?" A. "Yes, it did."

Q. "That was an occasion when your customers could *call*, but not *put*, eh?"

Mr. Sage looked as if he did not understand and made no reply.

Mr. Choate then added: "Did you not then have a run on your office?"

The witness made some reply, hardly audible, concerning a party of Baltimore roughs, who made a row about his office for an hour when he refused to admit them.

This phase of the question was left in that vague condition, and the cross-examiner opened a new subject and unfolded a three-column clipping from a newspaper, which was headed, "A Chat with Russell Sage."

Q. "The reporters called on you soon after the explosion?" A. "Yes."

Q. "One visited your house?" A. "Yes."

Q. "Did you read over what he wrote?" A. "No."

Q. "Did you read this after it was printed?" A. "I believe I did."

Q. "Is it correct?" A. "Reporters sometimes go on their own imagination."

It developed that the article which Mr. Choate referred to was written by a grand-nephew of the witness. When it had thus been identified, Mr. Choate again asked the witness if the article was correct.

Colonel James exclaimed: "Are you asking him to swear to the correctness of an article from that paper? *Nobody* could do that."

"No," Mr. Choate quickly responded. "I am asking him to point out its errors. *Anyone* can do that."

This," said Colonel James, "is making a *comedy* of errors."

"The witness broke in upon this little relaxation with the remark, 'The reporter who wrote that was only in my house five minutes.'"

"Indeed," exclaimed Mr. Choate, waving the three-column clipping, "he got a great deal out of you, and that is more than I have been able to do."

The first extract from the newspaper clipping read as follows: "Mr. Sage looks hale and hearty for an old man,—looks good for many years of life yet."

Q. "Is that true?" A. "We all try to hold our own as long as we can."

Q. "You speak for yourself, when you say we all try to *hold on* to all that we can?"

At this Mr. James jumped to his feet again, and there was another spirited passage at arms. When all had quieted down, Mr. Sage was next asked if the article was correct when it referred to him as looking like a "warrior after the battle." He thought that the statement was overdrawn. The article referred to Mr. Sage's having shaved himself that morning which was three mornings after the explosion; and when he had read that, Mr. Choate asked: "Did you have any wounds at that time that a visitor could see?"

The witness replied that both of his hands were then bandaged.

Q. "You must have shaved yourself with your feet."

\* \* \* \*

Q. "Was it a relief to you to see Laidlaw enter the office when you were talking to Norcross?" A. "No, and if Laidlaw had stayed out in the lobby instead of coming into my office, he would have been by Norcross when the explosion took place."

Q. "Then you think Laidlaw is indebted to you for saving his life instead of your being indebted to him for saving yours?" A. (Decidedly). "Yes, Sir."

Q. "Oh, that makes this a very simple case, then. Did you bring your clerk here to testify as to the condition of the office after the police had cleared it out?" A. I did not bring him here, my counsel did?

Q. "I see, you do not do any barking when you have a dog to do it for you?"

Lawyers Dillon and James jumped up, and Mr. James said gravely, "which of us is referred to as a dog?"

A. (Laughingly). "Oh, all of us."

Mr. Choate seldom reproved the witness for the character of his answers, although when he was examined by Colonel James on the re-examination he was treated with very much less courtesy, for the Colonel frequently requested him, and rather roughly, to be good enough to confine his answers to the question.

Mr. Choate's next question referred to the diagram which had been in use up to that point. He asked the witness if it was correct,

A. "I think it is not quite correct, not quite; if the Jury will go down there, I would be glad to have them, be glad to do anything. If the Jury will go down there, I would be very glad to furnish their transportation—if they will go."

Q. "If you won't furnish anything *but* transportation, they won't go." A. "It is substantially correct. I had a diagram made and I offered an opportunity to Mr. Laidlaw's counsel to have a correct one made. I never withheld anything from anybody."

The diagram which Mr. Sage had prepared was produced and upon examination it was seen that it contained lines indicating a wrong rule, and had some other inaccuracies which did not seem to amount to much really; but Mr. Choate appeared to be very much impressed with these differences.

"I want you," he said to the witness, "to reconcile your testimony with your own diagram."

The witness looked at the diagram for some time, and Mr. Choate, observing him, remarked, "You will have to *make a straddle* to reconcile that, won't you?"

Some marks and signs of erasures were seen on the Sage diagram, which gave Mr. Choate an opportunity to ask, in a sensational tone, if any one could inform him who had been tampering with it. No one could, and the diagram was dropped and the subject of a tattered suit of clothes taken up again.

Q. "What tailor did you employ at the time of the explosion?" A. "Several."

Q. "Name them; I want to follow up these clothes." A. "Tailor Jessup made the coat and vest."

Q. "Where is his place?" A. "On Broadway."

Q. "Is he there now?" A. "Oh, no, he has gone to heaven."

Q. "To heaven; where all good tailors go? Who made the trousers?" A. "I cannot tell where I may have bought them."

Q. "Bought them? You do not buy ready-made trousers, do you?" A. "I do sometimes. I get a better fit."

Q. "Get benefit?" A. "No; better fit."

Q. "Where is the receipt for them?" A. "I have none."

Q. "Do you pay money without receipts?" A. "I do sometimes."

Q. "Indeed?" A. "Yes; you do not take a receipt for your hat."

The vest was then produced, and two holes in the outer cloth were exhibited by Mr. Choate, who asked the witness if these were the places where the foreign substances entered which penetrated his body. The witness replied that they were, and Mr. Choate next asked him if he had had the vest re-lined. Mr. Sage replied that he had not. "How is it, then," Mr. Choate asked, passing the vest to the Jury with great satisfaction, "that these holes do not penetrate the lining." The witness said that he could not explain that, but insisted that that was the vest and it would have to speak for itself. Mr. Choate again took the vest and counted six holes on the cloth on the other side, and asked the witness if that count was right. Mr. Sage replied, "I will take your count," and then caused a laugh by suddenly reaching out for the vest, and saying, "if you have no objection, I would like to see it."

Q. "Now are not three of these holes moth-eaten?" A. "I think not."

Q. "Are you a judge of moth-eaten goods?" A. "No."

Q. "Where is the shirt you wore?" A. "Destroyed."

Q. "By whom?" A. "The cook."

Q. "The cook?" A. "I meant the laundress."

The vest was passed to the Jury for their inspection, and the Jurymen got into the eager whispered discussion as to whether certain of the holes were moth-eaten or not. There was a tailor on the Jury. Observing the discussion, the witness took back the garment and said in his most winning way, "Now we don't want the Jury to disagree." He next held up the coat, which was very much more injured in the tails than in front, and asked the witness how he accounted for that. A. "It is one of the freaks of electricity."

"One of those things no fellow can find out." The witness could not recall how much he had paid for the coat or for any of the garments, and after an unsuccessful attempt to identify the maker of the trousers by the name of the button, which proved to be the name of the button-maker, the old clothes were temporarily all wed to rest, and Mr. Choate asked the witness how long he had been unconscious. He replied that he thought he was unconscious two seconds.

Q. "How did you know you were not unconscious ten minutes?" A. "Only from what Mr. Walker says."

Q. "Where is he?" A. "On the street."

Q. "On Chambers Street, downstairs?" A. "No, on Wall Street."

Q. "Oh, I forgot that *the* street you means Wall Street. Were you not up and dressed every day after the explosion?" A. "I cannot remember."

Q. "You did business every day?" A. "Colonel Slocum and my nephew called upon me about business, and my counsel looked after some missing papers and bonds."

Q. "You then held some Missouri Pacific collateral trust bonds?" A. "Yes."

Q. "How many?" A. "Cannot say."

Q. "Can't you tell within a limit of ten to one thousand?" A. "No."

Q. "Nor within one hundred to two hundred?" A. "No."

Q. "Is it because you have too little memory or too many bonds? How many loans did you have out at that time?" A. "I cannot tell."

Q. "Can you tell within two hundred thousand of the amount then due from your *largest* creditor?" A. "Any man doing the business I am—."

Q. "Ch. there is no other man like you in the world. No, you cannot tell within two hundred thousand of the amount of the largest loan you then had out but you set your memory against Laidlaw's?" A. "I do."

Q. "Were you not very excited?" A. "I was thoughtful. I was self-poised. I did not believe his dynamite would sacrifice himself."

Q. "Never heard of a man killing himself?" A. "Not in that way."

## CHAPTER 8

### Unnecessary or Reckless Cross-Examination

The golden rule is "Don't ask the question unless there is a good reason for it," and "Don't ask the question for question's sake." 20 M. L. J. 154 (Eng.)

"Except in cases where your position is so bad that nothing can injure it, and something may improve it, do not splash about, and do not ask a question without being fairly certain that the answer will be favourable to you." 20 M. L. J. (Jour.) 154.

In resolving whether or not to cross-examine a witness, it is necessary to remember that there can be put three objects in cross-examination. It is

designed either to destroy or weaken the force of the evidence the witness has already given against you, or to elicit something in your favour which he has not stated, or to discredit him by showing the jury, from his past history and present demeanour that he is unworthy of belief. "Never should you enter upon a cross-examination without having a clear purpose to pursue. If you have not such, keep your seat." Far better to be mute through the whole trial dismissing every witness without a word, than for the mere sake of appearances, to ply them with questions, not the result of a purpose. You will not fall in the estimation of those on whom your fortunes will depend but the contrary. The attorneys well know that, in legal conflicts, even more than in military ones, discretion is the better part of valour; they will not mistake the motive of your silence; but they will commend the prudence whose wisdom is proved by the results. *Cox's Advocate*.

Your first resolve will be whether you will cross-examine at all. It is impossible to prescribe any rule to guide you in this; so much must depend upon the particular circumstances of each case. You must rely upon your own sagacity, on a hasty review of what the witness has said—how his testimony has affected your case, and what probability there is of your weakening what he has said. If he has said nothing material, usually the safer course is to let him go out without a question, unless indeed you are instructed that he can give some testimony in your favour, or damaging to the party who has called him, and then you should proceed to draw that out of him. But unless so instructed you should not, on some mere vague suspicions of your own, or in the hope of hitting a blot somewhere by accident, incur the hazard of eliciting something damaging to you—a result to be seen every day in our Courts. *Cox's Advocate*.

"Cross-examination is a most dangerous weapon in a double sense, it is dangerous to the side offering the witness, but it is more dangerous to the cross-examiner. You never ought to cross-examine a witness unless you know precisely what you want to get at and what you want to do. If you have attended a Court and watched a cross-examination, it may have occurred to you that it is nothing but rehearsal of the original testimony; and so it is. Now what is the effect of such testimony? The effect is to strengthen the original testimony by a repetition of that testimony." 12 M. L. J. 371.

The reckless asking of a number of questions on the chance of getting at something is too often a plan adopted by unskilled Advocates, and noise is mistaken for energy.

In criminal trials, especially in a capital case, so long as your case stands well, ask but few questions, and be certain never to ask any, the answer to which, if against you, may destroy your client's case; unless you know the witness perfectly well and know that his evidence will be favourable, or unless you be prepared with testimony to destroy him if he play traitor to the truth and your expectations. "Nothing is more unprofitable than an aimless cross-examination. It is better to ask no questions at all than to put a number of queries at random in the hope of accidentally eliciting some favourable reply. The consequences, more often than not are disastrous and re-act upon the cross-examiner in a manner he seldom anticipates. The practised hand never asks a question without an object in view, and should always be in a position to make a fairly accurate forecast of the probable reply." See Rahmatullah, p. 34.

"A mere aimless, haphazard cross-examination is a fault every advocate should strenuously guard against. It is far better to say nothing than to risk the consequence of random shots, which may as often wound your friends as

your opponents. Very little experience in civil or criminal Courts and in the latter especially, will assure you that there is no error so common as this. Some persons seem to suppose that their credit is concerned in getting up a cross-examination, and they look upon the dismissal of a witness without it as if it were an opportunity lost, and they fear that clients would attribute it, not so much to prudence as to conscious incapacity. So they rise and put a number of questions that do not concern the issue, and perhaps elicit something more damaging to their own cause than anything the other side has brought out, and the result is, that they have their client in a far worse condition than before. Let it be a rule with you *never to cross-examine unless you have some distinct object to gain by it*. For better be mute through the whole trial, dismissing every witness without a word, than for the sake of appearances, to ply them with questions not the result of a purpose. You will not fall in the estimation of those on whom your fortunes will depend; but the contrary. It is well-known that in legal conflicts, even more than in military ones, discretion is better part of valour. Your first resolve will therefore be, *whether you will cross-examine at all*. It is impossible to prescribe any rule to guide you in this; so much must depend upon the particular circumstances of each case. You must rely upon your own sagacity, on a hasty review of what the witness has said—how his testimony has affected your case, and what probability there is of your weakening what he has said. If he has said nothing material, usually the safe course is to let him go without a question, unless indeed you are instructed that he can give some testimony in your favour, or damaging to the party who has called him, and then you should proceed to draw that out of him. But unless so instructed, you should not on some mere vague suspicions of your own, or in the hope of hitting a point somewhere by accident incur the hazard of eliciting something damaging to you—a result to be seen every day in our Courts.” See Cox’s Advocate.

“Cross-examination is undoubtedly one of the most powerful weapons for exposing falsehood and eliciting truth, but cross-examination in criminal cases is an extremely dangerous thing. Unskilful or unnecessary cross-examination digs the grave of many cases, which but for the mistake would have leaned on the side of victory. Besides natural aptitude, it requires considerable experience to become a good cross-examiner. Before you frame your question you must probe the witness’s thoughts and ascertain what is passing in his mind. You must forestall his reply and be ready with the next question so that you may baffle him by anticipating. If you are a beginner, your inexperience is no excuse, if instead of observing silence you put questions haphazardly without caring in the least for the serious consequences that they might entail. If you do not know what to ask or how to ask, you can at least serve your client by keeping silent and dismissing the witness after putting a few common place questions by way of feeler. Silence in such moments is more beneficial than pursuing a roving cross-examination which is fraught with great danger. A single injudicious question will push your case to a fathom beyond the possibility of rescue. A fondness for getting contradictory statements is to a great extent responsible for needless cross-examination.” See Sarkar’s Modern Advocacy, 260.

“Never cross-examine any more than is absolutely necessary” is a sound rule. When you are not sure that the answers will be favourable to you, or you have no idea one way or the other, it is better to ask too little than too much. No doubt occasions will arise when perilous questions must be risked, but you must look around before the leap is taken. Sometimes persistency of a client or adviser prompts an advocate to ask a question with disastrous consequences to his case. An advocate should not on any account surrender his own judgment to such importunities. If he is decidedly of opinion that the question is risky and

there is more chance of its causing injury than good, he must not give away. Serjeant Ballantyne in his "Experiences" quotes an instance in the trial of a prisoner on the charge of homicide, where a once famous English barrister had been induced by the insistence of the prisoner's attorney, although against his own judgment, to ask a question on cross-examination, the answer to which convicted his client. Upon receiving the answer he turned to the attorney who had advised him to ask it, and said emphasising each word, "Go home; cut your throat; and when you meet your client in hell, beg his pardon."

When the evidence in the examination-in-chief is clear and unimpeachable, it is not advisable to attempt to mend matters by cross-examining directly on the point. Such a case will not infrequently make your opponent's case more strong. The witness will only get a chance of repeating his story with emphasis and if the transaction deposed to really occurred, constant interrogation will have the effect of reminding him of many details which he had omitted or forgotten. Injudicious attacks upon the credit of witnesses, at the dictation of a party, do more harm than good. A party, is in most cases actuated by bitter personal feelings against his opponent, and he is always anxious to seize upon the opportunity of heaping insults on him or his witnesses in the box, irrespective of the result of his case. If unfounded suggestions are thrown out indiscriminately and incidents that took place decades ago and do not affect the credibility of the witness on the matter on which he testifies, are raked up, they irritate the Judge and make the jury unsympathetic.

"If cross-examination is a powerful engine, it is likewise an extremely dangerous one, very apt to recoil even on those who know how to use it. The young advocate should reflect that if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth that he is almost sure to recollect every *material* circumstance by which it was accompanied; and the more his memory is probed on the subject, the more of the circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses, of immaterial circumstances not likely to attract attention, or even slight discrepancies in their testimonies respecting them, so far from impeaching their credit, often rather confirms it. Nothing can be more suspicious than a long story, told by a number of witnesses who agree down to the minutest details. Hence it is a well-known rule that a cross-examining advocate ought not, in general, to ask questions the answer to which, if unfavourable will be conclusive against him; as, for instance, in a case turning on identity, whether the witness is sure, or will swear, that the accused is that man of whom he is speaking. The judicious course is to question him as to surrounding or even remote matters; his answers respecting which may show that, in the testimony he gave in the first instance, he either spoke falsely or was mistaken. Under certain circumstances, however, perilous questions must be risked; especially where a favourable answer would be very advantageous and things already press so hard against the cause of the cross-examining advocate, that it could scarcely be injured by an unfavourable one." Best, S. 660.

"Let it be a rule with you never to cross-examine unless you have some distinct object to gain by it. Far better be mute through the whole trial, dismissing every witness without any word, than, for the sake of mere appearances, to ply them with questions not the result of a purpose. You will not fall in the estimation of those on whom your fortunes will depend; but the contrary. The attorneys well known that in legal conflicts, even more than in military ones, discretion is the better part of valour; they will not mistake the motive of your silence, but they will commend the prudence whose wisdom is proved by the results. *Your first resolve will therefore be, whether you will cross-*



*examine at all.* It is impossible to prescribe any rule to guide you in this; so much must depend upon the particular circumstances of each case. You must rely upon your own sagacity, on a hasty review of what the witness has said—how his testimony has affected your case, and what probability there is of your weakening what he has said. If he has said nothing material, usually the safer course is to let him go without any question, unless indeed you are instructed that he can give some testimony in your favour, or damaging to the party who has called him, and then you should proceed to draw that out of him. But unless so instructed, you should not, on some mere vague suspicions of your own or in hope of hitting a bolt somewhere by accident, incur the hazard of eliciting something damaging to you—a result to be seen every day in our Courts. So, as a general rule, it is dangerous to cross-examine witnesses called for mere formal proofs, as to prove signatures, attestations, copies, and such like. Still, such witness are not to be immediately dismissed, for you should first consider if there be any similar parts of your case which they may prove, so as to save a witness to you.” *Cox’s Advocate.*

Sir Henry Hawkins once said :—“ I can’t explain my success as a cross-examiner, and I can lay down no golden rule of practice. Certainly the art of cross-examination is not to examine crossly, and perhaps, I may say that the art is not to cross-examine at all. It may savour of a contradiction in terms, but my meaning is that the cross-examiner should not put a question unless he has a sound reason for doing so. Sometimes my cross-examination has consisted of a look, sometimes a nod. I seldom in any case put many questions, and never splashed about; that is fatal.” *See 20 M. L. J. 157, 5 M. L. T. 106.*

The observations of Sergeant Billintyne on this point and upon the subject of cross-examination generally may prove useful. He says :—“ The records of Courts of Justice of all times show that truth cannot, in a great number of cases tried, be reasonably expected. Even when witnesses are honest and have no intention to deceive, there is a natural tendency to exaggerate the facts favourable to the cause for which they are appearing, and to ignore the opposite circumstances; and the only means known to English Law by which testimony can be sifted is cross-examination. By this agent, if skilfully used, falsehood ought to be exposed, and exaggerated statements reduced to their true dimensions. An unskilful use of it, on the contrary, has a tendency to uphold rather than destroy. If the principles upon which cross-examination ought to be founded are not understood and acted upon, it is worse than useless, and it becomes an instrument against its employer. The reckless asking of a number of questions on the chance of getting at something is too often a plan adopted by unskilled advocates, and noise is mistaken for energy. “There are, generally speaking, two schools of cross-examination. One is known by the description of severe cross-examination. By this method the witness is taken over the whole facts of the case and minutely catechised as to his acquaintance with them. Given a very skilful counsel and a flagrantly dishonest witness, this style may serve its purpose; but, as a general rule, witnesses tell some truth, are not fools, and are not inclined to be like clay in the hands of the examiner. “Not infrequently, then, the ‘severe cross-examination’ gives an able witness the opportunity of emphasizing his evidence-in-chief and driving home points actually unnoticed in his first examination. The Tichborne claimant was subjected to a severe cross-examination before the Magistrate prior to the committal, and, in the opinion of Sir Henry Hawkins, it was out of the questions then put to him that he, to a great extent, fortified his case subsequently. A short cross-examination, on the other hand, leaves good or bad alone, and, instead of attempting to prove the witness a liar out of his own mouth, relies on the testimony of other witnesses to nullify the objectionable evidence.” *See 18 Cr. L. J. p. 109.*

## Illustrations

(i) One Dr. Buchanan was charged with the offence of having poisoned his wife—a woman considerably older than himself, and who had made a will in his favour—with morphine, and with atrophine, each drug being used in such proportion as to effectually obliterate the group of symptoms attending death when resulting from the use of either drug alone. At Buchanan's trial the district attorney found himself in the extremely awkward position of trying to persuade a jury to decide that Mrs. Buchanan's death was, beyond all reasonable doubt, the result of an overdose of morphine mixed with atrophine administered by her husband, although a respectable physician, who had attended her at the death-bed, had given it as his opinion that she died from natural causes and had himself made out a death certificate in which he attributed her death to apoplexy. It was only fair to the prisoner that he should be given the benefit of the testimony of this physician. The district attorney, therefore, called the doctor to the witness-stand and questioned him concerning the symptoms he had observed during his treatment of Mrs. Buchanan just prior to her death, and developed the fact that the doctor had made out a death certificate in which he had certified that in his opinion apoplexy was the sole cause of death. The doctor was then turned over to the lawyers for the defence for cross-examination. In such a case one would suppose that no questions are necessary in cross-examination. But the counsel for the defence put this most irrelevant and dangerous question to the witness: "Now doctor, you have told us what this lady's symptoms were, you have told us what you then believed was the cause of her death, I now ask you, has anything transpired since Mrs. Buchanan's death which would lead you to change your opinion as it is expressed in this paper?" The doctor settled back in his chair and slowly repeated the question asked: "Has anything transpired since Mrs. Buchanan's death which would lead me to change my opinion as it is expressed in this paper?" The witness turned to the Judge and inquired if in answer to such a question he would be allowed to speak of matters that had come to his knowledge since he wrote the certificate. The Judge replied: "The question is a broad one. Counsel asks you if you know of any reason why you should change your former opinion. The witness leaned forward to the stenographer and requested him to read the question over again. This was done. The attention of everybody in Court was by this time focussed upon the witness, intent upon his answer. It seemed to appear to the jury as if this must be the turning point of the case.

The doctor having heard the question read a second time, paused for a moment, and then straightening himself in his chair turned to the cross-examiner and said, "I wish to ask you a question. Has the report of the chemist telling of his discovery of atrophine and morphine in the contents of this woman's stomach been offered in evidence yet?" The Court answered, "It has not."

"One more question," said the doctor, "Has the report of the pathologist yet been received in evidence?" The Court replied, "No."

"Then," said the doctor rising in his chair, "I can answer your question truthfully, that as yet, in the absence of the pathological report and in the absence of the chemical report, I know of no legal evidence which would cause me to alter the opinion expressed in my death certificate."

It is impossible to exaggerate the impression made upon the Court and jury by these answers. All the advantage that the prisoner might have derived from the original death certificate was entirely swept away. The trial lasted for fully two weeks after this episode. When the jury retired to their consultation room at the end of the trial, they found they were utterly unable to agree upon a verdict. At the expiration of this time, the jury returned to the court-room and asked to have the testimony of this doctor read to them which was no doubt

done. The result was that the jury retired a second time and immediately agreed upon their verdict of death." *See Wellman, pp. 77—79.*

(ii) In this case the question was whether the accused was sane or insane at the time of the commission of the offence. One Dr. Hamilton had been retained by the defence and had made a special study of the accused's case, had visited him for weeks at the prison, and had prepared himself for a most exhaustive exposition of his mental condition. "Upon calling him to the witness-chair, however, counsel for the accused (Mr. Howe) did not question his witness so as to lay before the jury the extent of his experience in mental disorders, and his familiarity with all forms of insanity, nor develop before them the doctor's peculiar opportunities for judging correctly of the prisoner's present condition. The advocate evidently looked upon the advocates in charge of the prosecution as a lot of inexperienced youngsters, who would cross-examine at great length and allow the witness to make every answer tell with double effect when elicited in cross-examination by counsel for the crown." Counsel for the accused contented himself with these two questions and answers:

Q. "Dr. Hamilton, you have examined the prisoner at the Bar, have you not?" A. "I have, Sir."

Q. "Is he, in your opinion, sane or insane?" A. "Insane."

"You may cross-examine," thundered the counsel with one of his characteristic gestures. There was a hurried consultation between the advocates for the crown.

"We have no questions," remarked Mr. Nicoll, quietly.

"What," exclaimed Howe, "not ask the famous Dr. Hamilton a question? Well, I will, and turning to the witness began to ask him how close a study he had made of the prisoner's symptoms, etc., when, upon objection by the counsel for the prosecution, the Court directed the witness to leave the witness-box as his testimony was concluded, and ruled that inasmuch as the direct examination had been finished and there had been no cross-examination, there was no course open to Mr. Howe but to call his next witness." *See Wellman, p. 129.*

(iii) It was clear that no charge of murder could be proved without identification. The authorities boldly made a dash for the capital charge, in the hope that something might turn out. And now, driven to their wit's end, old Mr. Smith was examined by one of the best advocates of the day and this is what he made of him:

Q. "You have seen the remains?" A. "Yes."

Q. "Whose do you believe them to be?" A. "My daughter's, to the best of my belief."

Q. "Why do you believe them to be your daughter's?" A. "By the height, the colour of the hair and the smallness of the foot and leg."

That was all, and it was nothing.

But there must needs be cross-examination if you are to satisfy your client. So the defendant's advocate asks:

Q. "Is there anything else upon which your belief is founded?" A. "No," hesitatingly answers the old man, turning his hat about as if there was some mystery about it.

There is a breathless anxiety in the crowded Court, for the witness seemed to be revolving something in his mind that he did not like to bring out.

"Yes," he said, after a dead silence of two or three minutes. "My daughter had a scar on her leg."

There was sensation enough for the drop scene. More cross-examination was necessary now to get rid of the business of the scar, and some re-examination too.

The mark, it appeared, was caused by H. H. H. having fallen into the fire-place when she was a girl. Defence counsel asked :

Q. "Did you see the mark on the remains?" A. "No; I did not examine for it. I had not seen it for ten years."

There was much penmanship on the part of the officers for the Crown, as many interchanges of smiles between the officials as if the discovery had been due to their sagacity; and they went about saying, "How about the scar?" "How will he get over the scar?" "What do you think of the scar?" Strange to say, the defendant's advisers thought it prudent to ask the Magistrate to allow the doctors on both sides to ascertain whether there was a scar or not, and stranger still, while giving his consent, the Magistrate thought it was very immaterial. It proved to be so material that when it was found on the leg exactly as the old man and a sister had described it, the doctors cut it out and preserved it for production at the trial. After this discovery, of course, the result of the trial was a foregone conclusion. See Harris' Illustrations in Advocacy, pp. 91-92.

(iv) In a breach of promise of marriage case against a clergyman, the pleadings stated that the promise was merely conditional, and that the condition had not been performed. It was a weak case, but the advocate for the plaintiff was strong and wary. An inadvertent word uttered by his learned friend, counsel for the defendant, was another mistake.

The following cross-examination of the lady plaintiff by the reverend defendant's counsel seems to have been based on no principle whatever, but apparently directed to satisfy his own curiosity.

Q. "Let me ask you, did you frequently converse about marriage?" A. Oh yes; it was his constant theme."

Q. "You liked it?" A. "Oh yes; it was very agreeable—my future welfare—."

Q. "You were desirous of marrying him, I suppose." A. "Oh yes, certainly; he had promised me, and was always promising me."

Counsel.—"Stay, we will come to that presently." "Let her answer please," said the plaintiff's counsel, "it is your own question."

Q. "Did he tell you his income would not permit him to marry?" A. "Oh yes many times."

Q. "Did he say he would not marry until he had an income of his own?" A. "Oh yes, many times."

Q. "What did you say?" A. "That I would try and get him one."

Q. "But you never got him one?" A. "Oh yes, I did, and he refused to accept it."

Q. "Where did you get him a living?" A. "At St. Swithin's."

Q. "Do you mean to say St. Swithin's was ever offered?" A. "Oh yes, I have a letter here to prove it."

The letter was called for by the lady's counsel.

The letter was read. It showed that if the promise was conditional the letter proved the fulfilment of the condition, and the only remaining question was that of damages.

As it not to leave anything undone even with regard to the enhancement of the damages, the defendant's counsel asked the following questions :

"Is it a fact that you and the defendant were three weeks in the house together without anyone else being there?"

This question, properly speaking, ought not to have been asked at all. It was an insinuation against the virtue of the plaintiff. You could see that the jury were all fathers, with daughters of their own; they were so much affected. The fair plaintiff looked beseechingly at the Judge, who was full of sympathetic indignation, and then observed with the most wonderful pathos in her voice "My lord :—Oh (wringing her hands) -Never."

This last answer settled the question of damages. The jury gave a verdict for one thousand pounds damages. See Harri., pp. 4-9.

(v) A woman was charged with the murder of her child; she was defended by a then well known Q. C.

The witnesses for the prosecution, although they proved finding the body of the child in the prisoner's hut, could not establish that the prisoner ever had a child, much less the child in question, and there was practically no evidence against her.

But her counsel, anxious to make assurance doubly sure, cross-examined the last (police) witness, so as to gain the jury's sympathy with the prisoner. He asked: "You know the prisoner was badly treated by a young man?"

"Yes, he broke off the engagement when he heard she was a mother."

The damning fact had been brought out by her own counsel, and the prisoner was convicted and subsequently hanged. 20 M. L. J. 291.

(vi) At a trial for murder, a Welsh advocate was instructed for the defence by one of the leading local practitioners. The counsel was a very peremptory little man, and during cross-examination he declined to put a certain question suggested by the gentleman instructing him. The solicitor pressed him again and again on the point, but still he refused, "Well, Sir," said the solicitor at last, "these are my instructions, and mine is the responsibility, therefore I insist upon your putting the question." "Very well," said the barrister. "I'll put the question, but remember, as you say, yours is the responsibility." The question was put, and the result was that it contributed in a large degree to hanging the prisoner. The sentence having been pronounced the barrister turned round in a fearful rage to the solicitor and exclaimed: "When you meet your client in hell, which you undoubtedly will, you will be kind enough to tell him it was your question and not mine." 13 Cr. L. J. 109.

"It has been said by a lawyer of considerable experience that saying nothing will frequently accomplish more than hours of questioning." It is the client's interest nor his whims or wishes, that you are to consult. See 16 M. L. J. 35.

(vii) Colonel Henderson says: "Some two years ago I was in New York City, overlooking the taking of some depositions in the case of a lady who had instituted a damages suit against the railway company by which I was employed. She lived in Tennessee, and was travelling through Virginia. There had been a heavy rain that had washed a lot of sand down upon the track. The locomotive ran upon this sand and quietly and sweetly turned over. Nobody was hurt so far as we could tell except this lady. For many years she had been under treatment for some ailment to one of her limbs. She was on the way to her specialist in New York then for further treatment of this limb. It was the deposition of this specialist that we were taking. Our counsel in charge of the case was conducting the cross-examination. The learned doctor told us all about her present condition, how she was permanently injured, etc., etc. He made it as horrible a damage as a doctor can. Finally they turned this physician over to us for cross-examination. Our counsel went on and developed her condition before as being very similar to that in which she was at present, in the fact that she had been on her way to her doctor for treatment at the time of the

accident complained of. The witness testified all right as to what the condition of this good lady was : our counsel turned to me by way of consultation and said in a low voice.

"The other side did not ask him whether or not her present condition is due to the turning over of that car, or whether it was due to the old ailment. Shall I ask him?"

"No, do not do it."

"Yes," he said, "I think I had better ; I think I shall. I believe that will end the law suit."

"So do I," I replied.

"Well," said he, "he is obliged to say it, he is obliged to say it."

"Remember he is her doctor, he has been getting her money. I believe it a fine question to ask, but I would sooner ask it of the jury. The jury cannot explain it like that doctor can." But still he insisted.

"Well, I will take the responsibility," he added.

"Very well, you are in charge. Ask it and then will come the deluge;" I told him.

So he asked the question and the doctor said :

"Yes, she had that ailment, but I thought she was completely cured of it. She was so severely shaken up in this accident that it has turned the whole thing loose worse than ever."

That was a fine question, a very learned question. It was a costly question for I turned back home and paid her £ 10,0 0 damages. *See* 14 Cr. L. J., p. 28.

(viii) *See* Illustration in chap. 4.

## CHAPTER 9

### Too Little Cross-Examination

A number of cases are spoiled by too little cross-examination. When a number of collateral facts are deposed to in examination-in-chief, it is the bounden duty of the cross-examiner to put questions in order to disprove them, unless he chooses to admit some of them. Relevant and really important questions should never be omitted. The sound rule is "ask as many questions and such questions as are necessary for your case, ask neither more nor less. It is dangerous to ask too little as well as too much." 13 Cr. L. J. 109.

Sometimes very important points are left out in case of too little cross-examination.

Although witnesses swear to tell "The truth, the whole truth, and nothing but the truth," yet there are witnesses who believe that they are not obliged to tell anything they are not questioned about, and sometimes, if asked, they give evasive answers.

### Illustrations

(i) "I was counsel," narrates an American lawyer, "for a railway company, and I won the case for the defence mainly on account of the testimony of an old coloured man who was stationed at the crossing. When asked if he had swung his lantern as a warning, the old man swore positively, 'I surely did.' I subsequently called on the old negro and complimented him on his testimony. He said, 'Thank you, Marse John, I got along all right, but I was awfully scared because I was afraid that lawyer man was going to ask me was my lantern lit. The oil was all exhausted before the accident.'" *See* 13 Cr. L. J. 109.

(ii) Hawkins was once retained for an Insurance Company, the plaintiff, being clothiers who sold ready made clothes, and their premises having been burnt down, they made an enormous claim against the Insurance Company. Hawkins having elicited that there were piles upon piles of trousers, and nearly all of them had brass buttons, commented on the fact that, in spite of careful sifting of the *debris*, not a button had been found among the salvage. The Court adjourned till the following morning, when hundreds of buttons partially burnt were brought into Court by the Jew plaintiffs. Cockburn, Chief Justice, inspected the buttons, and enquired how Hawkins accounted for them, after having stated that none had been found.

"Up to last night my Lord, none had been found."

"But," said Cockburn, "these buttons have evidently been burnt in the fire. How do they come here?"

"On their own shanks, my Lord."

Cockburn agreed, and so did the jury, on a verdict for the defendants. See 15 M. L. J. 209.

(iii) "Some time ago the writer, while waiting in Court, watched the trial of a case where the plaintiff sought to recover damages for a breach of warranty. The defendant had sold him a horse with an express warranty that he was 'sound and kind and free from all defects.' The next day the plaintiff noticed that a shoe was loose, and he undertook to drive him into a blacksmith's shop to have him shod, where the horse exhibited such violent reluctance that he was obliged to abandon the attempt. Repeated efforts made it evident that he never would be shod willingly, and therefore he was obliged to sell him. The defendant called two witnesses. The first an honest, clean-looking man, testified that he was a blacksmith, that he knew the horse in question perfectly well and he had shod him about the time referred to in plaintiff's testimony. Cross-examination proceeded thus:

Q. 'Did you have any difficulty in shoeing him?' A. 'Not the least. He stood perfectly quiet. Never had a horse stood quieter.'

"The other, a venerable looking man, with clear blue eyes, testified that he had owned the horse and that he was perfectly kind.

"Did you have any trouble about getting him into a blacksmith's shop?"

"Well, Sir, I don't remember that I ever had occasion to carry him to a blacksmith's shop while I owned him."

"The plaintiff's counsel evidently thought that cross-examination would only develop this unpleasant testimony more strongly, so he let the witnesses go. The Jury found for the defendant.

"The next morning as the writer was sitting in Court waiting for a verdict, a man behind him, whom he recognised as the blacksmith, leaned forward and said: 'You heard that horse case tried yesterday, didn't you? Well, that fellow who tried the case for the plaintiff did not know how to cross-examine worth a cent. I told him that the horse stood perfectly quiet while I shod him, and so he did. I did not tell him I had to hold him by the nose with a pair of piners to make him stand. The old man said he never took him to blacksmith's shop while he had him. No more he did. He had to take him out into an open lot and cast him before he could shoe him.' " See 10, American Law Review, 153.

## CHAPTER 10

### Bullying or Badgering Cross-Examination

There are, generally speaking, two schools of cross-examination. One is known by the description of severe cross-examination. By this method the

witness is taken over the whole facts of the case and minutely catechised as to his acquaintance with them. Given a very skilful counsel and a flagrantly dishonest witness this style may serve its purpose; but, as a general rule, witnesses tell some truth, are not fools, and are not inclined to be like clay in the hands of the examiner. 13 Cr. J. J., p. 109.

There are two styles of cross-examination, which may be termed the savage style and the smiling style. The aim of the savage style is to terrify the witness into telling the truth, the aim of smiling style is to win him to a confession. The former is by far the most frequently in use, specially by young advocates, who probably imagine that a frown and a fierce voice are proofs of power. Great is their mistake. The passions rouse the passions. Anger, real or assumed, kindles anger. An attack stimulates to defiance. By showing suspicion of a witness, you insult his self-love: you make him your enemy at once; you arm his resolution to resist you; to defy you, to tell you no more than he is obliged to tell; to defeat you, if he can.

Undoubtedly there are cases where such a tone is called for, where it is polite as well as just; but they are rare, so rare that they should be deemed entirely exceptional. In every part of an advocate's career, good temper and self-command are essential qualifications; but in none more so than in the practice of cross-examination. See Cox's Advocate.

Bullying and blustering or thumping the table are out of place in a Court of justice and seldom succeed. Such conduct only helps in drawing the sympathy of the Court or the jury towards the witness. Good manners and good temper are indispensable requisites of a good advocate.

"Bullying and browbeating a witness, misleading him, as for instance by putting questions which assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the fact—questioning him in a manner which assumes that he has been lying throughout the whole or the greater part of his examination-in-chief—confusing him when stupid—terrifying him when timid—will oftener than otherwise fail to search the mind and conscience of an adverse witness, when suavity of manner, gentleness and courtesy will surely put him off his guard, while rapid and subtle questioning elicits from him innumerable facts *insignificant* as they appear to him at the moment, but which when put together and arranged, create a whole, in which the most ignorant beholder instantly recognizes the truth." (Field, 447-448)

"It is marvellous how much may be accomplished with the most difficult witness, simply by good humour and smile; a tone of friendliness will often succeed in obtaining a reply which has been obstinately denied to a surly aspect, and a threatening or reproachful voice. As a general rule, subject to such very rare exceptions as scarcely enter into your calculations, you should begin your cross-examination with an encouraging look, and manner, and phrase. Remember that the witness knows you to be on the other side; he is prepared to deal with you as an enemy; he anticipates a badgering; he thinks you are going to trip him up, if you can; he has, more or less, girded himself for the strife. It is amusing to mark the instant change in the demeanour of most witnesses when their own counsel has resumed his seat, and the advocate on the other side rises to cross-examine. The position, the countenance, plainly show what is passing in the mind. Either there is fear, or, more often, defiance. If you look fierce and look sternly, it is just what had been expected, and you are met by corresponding acts of self-defence. But if, instead of this, you wear a pleasant smile, speak in a kindly tone, use the language of a friendly questioner, appear to give him credit for a desire to tell the whole truth, you surprise, you



disarm him; it is not what he had anticipated, and he answers rankly your questionings." (Cox's Advocate).

There are occasions where a sharp tone and an appropriate expression of face are called for in order to produce the desired effect. It can only be successfully employed by advocates of outstanding merit. The following extract from O'Brien's *Life of Lord Russell*, will clearly illustrate the point: "Once, when cross-examining a witness by the name of Sampson, who was sued for libel as editor of the *Referee*, Russell asked the witness a question which he did not answer. 'Did you hear my question?' said Russell *in a low voice*. 'I did,' said Sampson. 'Did you understand it?' asked Russell, *in a still lower voice*. 'I did,' said Sampson. 'Then,' said Russell, *raising his voice to its highest pitch*, and looking as if he would spring from his place and seize the witness by the throat, 'Why have you not answered it? *Tell the jury why you have not answered it.*' A thrill of excitement ran through the court-room. Sampson was overwhelmed, and he never pulled himself together again."

Wellman says: "A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self-control. If you show by your face how the answer hurts, you may lose the case by that one point alone. How often one sees the cross-examiner fairly staggered by such an answer. He pauses, perhaps blushes, and after he has allowed the answer to have its full effect, finally regains his self-possession, but seldom his control of the witness. With the really experienced trial lawyer, such answer, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, 'Who do you suppose would believe that for a minute?' (Wellman pp. 13-14).

"It is absurd to suppose that any witness who has sworn, positively to a certain set of facts, even if he has inadvertently stretched the truth, is going to be readily induced by a lawyer to alter them and acknowledge his mistake. People as a rule do not reflect upon their meagre opportunities of observing facts and rarely suspect the frailty of their own powers of observation. They come to a Court, when summoned as witnesses, prepared to tell what they think they know; and in the beginning they resent an attack upon their story as they would one upon their integrity. If the cross-examiner allows the witness to suspect, from his manner towards him at the start, that he distrusts his integrity, he will straighten himself in the witness chair and mentally defy him at once. If, on the other hand, the counsel's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can almost imperceptibly be induced to enter into a discussion of his testimony in a fair-minded spirit and the cross-examiner can soon disclose the weak point in the testimony." See Wellman, pp. 10-11.

Even men of greatest ability and experience often dread the ordeal of cross-examination. Sometimes you get a witness who is thoroughly frightened. Women sometimes get frightened and they tell you they do not know what they do know, and they tell you this even when their want of knowledge seems to be fatal to their case. What shall you do with such a witness? You have to show by a course of cross-examination that the witness simply does not know what she is talking about.

Some years ago an eminent English counsel encountered just that difficulty. The witness said she did not know what she did know; if he did not know she could not recover. So he began to put a series of questions to her. 'What day of the week is this?' "I do not know." "What year is this?" "I do not

know." "What is your name?" "I don't know." Well it was now very apparent to everybody that the woman did not know what she was talking about. This exhibition saved her case. 12 M. L. J. (Jour) 369-370.

The counsel should be careful not to frighten a witness by point blank questions going at once to involve him in a contradiction; or he will see your design and thwart it by a resolute adhering to his first assertion. The counsel should inimate to him delicately his confidence that he is desirous of telling the truth and the whole truth. If distinguished men like Bushee and Beecher and Garrick are frightened at the idea of submitting to cross-examination, what must be the feelings of delicate women and young persons who are sworn for the first time and who are unaccustomed to the publicity incident to the trial of a cause in one of our Courts? How inexcusable then, must be the conduct of the advocates who handle such witnesses roughly in their cross-examination. See Wrottesley on Examination of Witnesses, pp. 101-102.

Great allowance is always made for a nervous witness, who invariably receives the sympathy of the jury. You have to guard, therefore, against offending that sympathy, as you undoubtedly would by a severe tone or manner. Harris' on Advocacy, XIV Ed. 1911, p. 82.

The sound rule is that the counsel should be rough to the ruffian and thunderbolt to the liar and merciful to the mild.

There are two methods of cross-examination generally used among the lawyers, which may be respectively termed the fierce, bulldozing style, and the pleasant, persuasive style. The bulldozer aims to scare the witness and thus break down the effect of his direct evidence by extorting from him an admission that he has committed perjury or by compelling him to relate an inconsistent story on the cross-examination. The bulldozer takes for his model the officials of the Spanish Inquisition, the witness chair is converted by him into a rack whereupon the victim of his wrath is stretched and tortured in an endeavour to compel him to beg for mercy. The witness who is subject to such an ordeal becomes at once the enemy of the lawyer who is conducting the cross-examination; he is immediately angry and defiant, takes up the challenge, and matches his will with the advocate. There are unquestionably cases where such a method of examination is proper and necessary, but they form the exception to the rule.

The pleasant style of the cross-examination will usually produce far more beneficial results. By appearing friendly to an opposing witness you at once disarm him of the hostility and prejudice with which he has been regarding you during his direct examination. He has probably been expecting an assault upon his character, and is prepared to defend himself, but under the influence of good-humoured questions he becomes softened, and is the more easily led to tell the exact truth. The old adage that "molasses catch more flies than vinegar" applies with peculiar force to the cross-examination of a witness. 14 Cr. L. J., 18-19.

Archbishop Whately strongly condemns this unfair treatment of witnesses by counsel. He says; "I think that the kind of skill by which the cross-examiner succeeds in alarming, misleading or bewildering an honest witness may be characterised as the most base and depraved of all possible employments of intellectual power. Nor is it by any means the most effectual way of eliciting truth. The mode best adapted for attaining this object is, I am convinced, quite different from that by which an honest, simple-minded witness is most easily baffled and confused. I have seen the experiment tried of subjecting a witness to such a kind of cross-examination by a practical lawyer as would have been, I am convinced, the most likely to alarm and perplex many and honest

witness, without any effect in shaking the testimony ; and afterwards by a totally opposite mode of examination, such as would not at all have perplexed one who was honestly telling the truth, that same witness was drawn on, step by step, to acknowledge the utter falsity of the whole. Generally speaking, a quiet, gentle and straightforward, though full and careful examination will be the most adapted to elicit truth, and the manœuvre and the brow-beating which are the best adapted to confuse an honest simple-minded witness are just what the dishonest one is the best prepared for. The more the storm blusters, the more carefully he wraps round him the cloak which a warm sunshine will induce him to throw off."

Section 152, Evidence Act, provides that the Court should forbid any question which appears to it to be intended to insult or annoy or which, though proper in itself, appears to the Court needlessly offensive in form.

Of all unfortunate people in this world, none are more entitled to sympathy and commiseration than those whom circumstances oblige to appear upon the witness stand in Court. You are called to the stand and place your hand upon a copy of the Scriptures in sheep skin binding with a cross on the one side and one on the other to accommodate either variety of the Christian faith. You are then arraigned before two legal gentlemen, one of whom smiles at you blandly because you are of his side, the other eyeing you savagely for the opposite reason. The gentleman who smiles proceeds to pump you of all you know, and having squeezed all he wants out of you hands you over to the other, who proceeds to show you that you are entirely mistaken in all your supposition, that you never saw anything you have sworn to, that you never saw the defendant in your life; in short, that you have committed direct perjury. He wants to know if you have ever been in state prison, and takes your denial with the air of a man who thinks you ought to have been there, asking all the questions over again in different ways; and tells you with an awe-inspiring severity to be very careful of what you say. He wants to know whether you meant something else. Having bullied and scared you out of your wits, and convicted you in the eye of the jury of prevarication, he lets you go. By and by everybody you have fallen out with is put on the stand to swear that you are the biggest scoundrel they ever knew, and not to be believed under oath. Then the opposing counsel in summing up paints your moral photograph to the jury as a character fit to be handed down to time as the type of infamy, as a man who has conspired against innocence and virtue, and stood convicted of the attempt. The Judge in his charge tells the jury if they believe your testimony, etc., indicating that there is even a judicial doubt of your veracity; and you go home to your wife and family, neighbours and acquaintances a suspected man, all because of your accidental presence on an unfortunate occasion. Wellman, p. 168—170.

Witnesses should be treated with kindness and consideration. They are as necessary to the administration of justice as the machinery of law. They should not be bullied or abused, and advantage should not be taken of their inexperience, illiteracy or young age. The better way is to create a sort of confidence by coaxing a witness and tacking him gently. The moment a witness suspects that the advocate doubts his veracity from the beginning, he prepares himself for the attack and renders cross-examination futile. Some men have a habit of commenting on the answers of witnesses as they are delivered and this should always be avoided. It creates bitterness and produces unfavourable impression on the Judge. It has the effect of evoking sympathy for the witness.

### Illustrations

(i) A barrister, who had only just emerged from the solicitor's ranks, said to another solicitor, "If your man doesn't settle, tell him I shall ask him whether

he doesn't eat his meals in the kitchen. I was articled to him and know all about him." 5 M. L. T. p. 105.

(ii) A witness, John Jones, had been called. He was sworn and asked to say what he knew about the affair. A. "Nothing."

Q. "Nothing! Have the goodness to pay attention, Sir. You remember being in the Red Cow Inn on the 10th of last month?" A. "No, I don't." The counsel handed the witness the depositions.

Q. "Is that your name?" A. "Yes."

Judge. "You may treat him as a hostile witness."

Q. "Mr. John Jones, you deny everything, you have previously sworn. Have you been in the company of prisoner's friends since you last gave evidence?" A. "No."

Q. "I see. What did you have to drink before coming here?" A. "Nothing except tea."

Q. "Tea ahem! a queer sort of tea. How many glasses of tea did you have?" A. "I had two cups."

Q. "Two very large cups, eh?"

The witness turned to the Judge. "My Lord, why should I be insulted?"

The Judge intervened, "Of course not: nobody means to insult you, but. . .

"My Lord, I know nothing about this case. I am a juror in waiting."

It may be noted that the barrister had not the patience to see that there was probably some mistake, but immediately jumped to suggestions of bribery and drunkenness! It was not his fault. Serjeant Burluz did the same sort of thing; but the Burluz type is becoming extinct now, and so much the better. 5 M. L. T. p. 105.

(iii) There was once a barrister who, in criminal cases, invariably commenced his cross-examination by gazing anxiously at a witness and saying: "Have you called at any public houses on your way here?" and on getting the answer. "No," would apologise and glance at the jury meaningly. The same person would also always ask a police witness whether he didn't like getting lodging and conduct money for attendance at the Court, the suggestion being that the case had been "got up," and so on.

There once was a solicitor in a London County Court who used to cross-examine a witness thus:

Q. "What! You don't mean to tell me you hand't got the brass?"

"Mr. . . ." interposed the Judge, "really you should show more respect to the Court."

"Well, your honour I mean money."

"(To witness) and you got it?" A. "No."

"Oh! you say that, do you? Well it is a lie, then." 5 M. L. T.

Another solicitor in a police Court while cross-examining a witness, received a disconcerting answer. The Court laughed. Not so the solicitor. He snook his fist at the witness, "You wait," he shouted, "I will catch you directly." 5 M. L. T. p. 105.

## CHAPTER 11

### Pleasant or Persuasive Style of Cross-Examination

The bullying style aims to scare the witness and thus break down the effect of his direct evidence by extorting from him an admission that he has committed perjury or by compelling him to relate an inconsistent story on the cross-examination.

The other style which is by far the most successful and pleasant, is to approach the witness in a courteous and friendly manner. This will disarm opposition from the beginning and establish a sort of confidence which is so very necessary in eliciting answers in support of your case. The witness has a dread of you. He knows that you will try to put him in a hole at the first opportunity; he anticipates a sharp attack and has come prepared for the contest. If you encourage him in a friendly manner without permitting him to think that his answers have surprised you, he enters into a frank discussion; he is put off his guard and forgets the points which he has come to uphold. The witness should be quietly and imperceptibly led to a position which would ultimately compel him to give away without knowing that he did so. And once the weak points are thus found out, the advocate will pursue them and the witness will soon find himself in a corner. Walsh says: "This method of cross-examination by direct attack is as a rule the least successful. It is certainly the least pleasant to hear, and the least edifying. The insidious, half-friendly, half-confidential method is usually the more successful, merely because if a witness is attempting to deceive it is more apt to put him off his guard" (Walsh's Advocate, p. 115). If from the attitude and expression of the cross-examiner the witness at the commencement suspects that his veracity is doubted, he will be at once put on his guard and will prepare himself fully for sticking to his story in the examination-in-chief. What is the secret of the art of cross-examination? Hawkins, J., (afterwards Lord Brampton) is said to have given the answer in one word—*Patience*. "It is building a brick wall round a man. You ask your question, and the answer enables you to plant one brick here. Then another question—and another brick in quite a different place. If you ask your questions politely, very likely he will place half a dozen bricks in position himself. They are scattered all over the place, but you have your plan. By degrees the ring is complete. The wall rises."

Mr. Rufus Choate, the greatest advocate of America for all time, was a master of what is known as the "smiling" style. He had a kind word for every one and was extremely courteous when he performed his duties in Court. He never employed the roaring method and maintained a wonderfully calm temperament in the midst of the greatest provocation and yet achieved the greatest success. "He never aroused opposition on the part of the witness by attacking him, but disarmed him by the quiet and courteous manner in which he pursued his examination. He was quite sure before giving him up, to expose the weak parts of his testimony or the bias, if any, which detracted from the confidence to be given it."

"His cross-examination was a model. As was said when speaking of his conversations, he never assaulted a witness as if determined to browbeat him." See Wellman, p. 12.

The pleasant style of cross-examination will usually produce far more beneficial results. By appearing friendly to an opposing witness you at once disarm him of the hostility and prejudice with which he has been regarding you during his direct examination. He has probably been expecting an assault upon his character, and is prepared to defend himself, but under the influence of good-humoured questions he becomes softened, and is the more easily led to tell the exact truth. The old adage that "molasses catch more flies than vinegar" applies with peculiar force to the cross-examination of a witness. 14 Cr. L. J., pp. 18-19.

From the time the average lay witness hears his name called by the Court orderly till he hears the welcome news, 'That will do, thank you,' he feels uneasy, he perspires, his pulse increases and somehow his nerves are not quite steady. Is all this necessary and unavoidable? The Court has ordered the witnesses to come at the expense of one of the parties, in order to tell it quietly and

disinterestedly what he knows of a certain state of facts. In theory the witness comes as a sort of friend to enlighten the Court with his knowledge. No liability, no punishment, no blot on his name will incur, provided only he speaks and speaks the truth. That is the theory; but the treatment meted out to the average witness in practice hardly conforms to it. The witness knows what he has to go through, and lets his distressing nervous aching heart. In other words, the witness knows that as soon as he pledges his solemn oath, he will be regarded as a target to be bullied and dodged by counsel for the opposite side, and sometimes too, by the counsel who called him, who seeks to make him by hook or crook, and what is called the art of examination and cross examination, tell a story favourable to his contention. The witness is perfectly honest, but he is just as ordinary layman, unfamiliar with the ways of lawyers. The atmosphere of Court breathes from the bald elevation of the witness box acts on him like some stupefactive drug, exciting his brain and dulling his faculty of memory. *1 M. L. J. p. 11*

"It is not easy to draw out by bullying things which a witness has come prepared to conceal. The contest leads to unpleasantness and recrimination. If a witness is questioned in a manner which assumes that he is lying or if an attempt is made to mislead him, he resents the attack and at once prepares himself for the fight. In the case of a witness of truth, he strengthens his statement by giving details which he is reminded of when questioned minutely. The genial and friendly way is by far the most successful method of cross-examination. If the witness is approached cautiously and courteously without letting him know that his answers have surprised or displeased the advocate and a sort of confidence is established by a conciliatory attitude, he may be led away imperceptibly from the statements which he made in examination-in-chief. In a recent speech delivered in London, Sir Walter Schwabe, K. C., late Chief Justice of the Madras High Court said: "Cultivate a pleasant manner and get on as friendly terms as possible with the witness. Reproving, lecturing, bullying were methods now recognised as belonging to a first generation. One should bring out the unpleasant facts with an air of condolence and regret rather than with an air of triumph, which might rouse sympathy and one should never lose one's temper with a witness." Witnesses come with a dread of being bullied and stirred into making inconsistent statements and when they are disarmed of the fear by courteous and sympathetic treatment, they enter into a frank discussion little suspecting that they would soon disclose the weak points in their testimony. Before a witness is cross-examined, the advocate must ascertain the points on which such examination is necessary. Cross examination is necessary only when the witness has said something against the client which, if allowed to go unchallenged, would injure the case. This standpoint is so often lost sight of and it is common experience that an advocate rises to his feet and heckles the witness at random for a considerable length of time, although the witness may not have said anything of importance against his client. This aimless cross examination is done with two objects in view. First, to see if anything may be elicited by firing questions on a variety of topics. Secondly, the advocate is obsessed with the idea that if he does not cross-examine for some time, his client will doubt his competency." *See Sarkar's Modern Advocacy, pp. 129-130*

A lawyer should always bear in mind that courtesy is far more effective than bullying. Even if he has to ask some questions relating to the previous conviction or regarding character or lapse of virtue, he should offer some sort of apology before asking such questions. The cross-examiner should, as a general rule, take the witness whom he has to examine, as it were, by the hand, 'make them his friends, enter into conversation with them, encourage them to tell him what would best

answer his purpose, and thus secure a victory without appearing to commence a conflict." *Law Journal*.

### Illustrations

(i) A person brought an action against a railway company for damages for injuries received through falling between the platform of a station and the steps of a railway carriage, alleging that the company was negligent in allowing such a space to exist—about one foot. The case for the company was that the platform and the step were safely constructed, and that the plaintiff was himself guilty of negligence in not taking care when he left the carriage. The plaintiff was cross-examined :

Q. "You say you left the carriage carefully when the train was at a standstill, and it was daylight?" A. "Yes."

Q. "Then how was it that you came to miss the step?" A. "It was too narrow." Q. "You think it should have overlapped the platform?" A. "Yes, or been nearer to it."

Q. "Do you know that thousands of persons have used that platform daily since 1870?" A. "Perhaps."

Q. "And that no accident has been traceable to the station or the carriage?" A. "Perhaps."

The next witness was a surveyor, who swore that a distance of a foot between the step and the platform was dangerous. Cross-examined :

Q. "What experience have you of railways?"

A. "Well, I am share-holder in one or two."

The other witnesses were left severely alone.

The jury found for the defendant. 20 M. L. J." pp. 225-226.

(ii) In this case witness testified to the firing of successive gun shots by the accused.

Q. "You say you saw the shots. A. "Yes"

Q. "How near were you to the scene of the affray?" A. "When the first shot was fired, I was about ten feet from the shooter."

Q. "Ten feet. Well now, tell the Court where you were when the second shot was fired?" A. "I didn't measure the distance."

Q. "Speaking approximately, how far should you say?" A. "Well, it approximated to half a mile." 25 M. L. J., p. 222.

(iii) In a breach of peace case the cross-examination proceeded as follows :

Q. "Now, Mr. McDonald, you declare that you are under the fear of bodily harm?" A. "I am, Sir."

Q. "You are even afraid of your life?" A. "I am, Sir."

Q. "Then you freely admit that Wheelock can whip you, Pat McDonald?"

The question aroused McDonald's "Irish" spirit instantly.

A. "Will Wheelock whip me? Never! I can whip him and any half dozen like him!"

"That will do, Mr. McDonald," said the attorney.

The Court was already in a roar, and the lawyer rested the case without further testimony or argument. The case was dismissed, for it was evident that McDonald could not be one under serious bodily fear of a man whom, in his own opinion, he had only to use-seventh of his strength to whip. 25 M. L. J. p.87.

**Be kind and courteous to witnesses :—**Docility and friendliness of a witness are of the utmost consequence. And courtesy towards him is a probable means to obtain and keep him, courtesy in word, voice and manner. Rudeness and incivility towards him is very likely to put him out of temper and to make him lay back his ears. Little peculiarities of his nature must be humoured; his sense of personal dignity must not be offended; if he be deaf, or have an impediment in his speech, this infirmity must not be a subject of merriment; and if his voice be naturally or from timidity low, he should be gently, not roughly, exhorted to speak up. So, if the witness exhibits any clownish or awkward habit or manner, it may be better to let it pass unnoticed than to attempt to correct it. "It is a common practice to tell a witness over and over again to mind he is upon his oath. Few witnesses bear this repeated admonition patiently. But when used in moderation and free from angry tone, the witness has no reason to complain of it, for it is known that some persons will *say* what they will not *swear*."

Courts and juries appreciate delicacy of feeling upon the part of advocates, and where in cross-examination it becomes important to inquire into the past history of a witness, or to speak about the death of a near relative or dear friend, or to touch some chord of sorrow, it is wise to use introductory expressions deploring the necessity of asking such questions, and representing it as one of the unpleasant but imperative duties of counsel is proper. Cicero furnishes an instance of this consideration for the feelings of others in his own person, in his defence of Cluentius, one of the charges against whom was that of having poisoned a son of one of the witnesses. Referring to this charge, he says: "I deny that this young man, who you say died immediately after drinking from the cup, died on that day at all. It is a great and impudent falsehood. Look at the facts. I say that he came to the dinner unwell, and, with the imprudence of youth, indulged too much at it; that he was ill for some days after, and so died. Who is the witness that speaks to this? he who mourns for his death,—his father; his father, I say, who, from his parental distress, would rise from the place where he is sitting to witness against Cluentius if he had the slightest suspicion of his guilt; he by his testimony acquits him. But (addressing the father) stand up, I pray, a moment, while, however painful it may be, you repeat this necessary evidence, in the course of which I will not detain you long; you have acted most righteously in not suffering your sorrow to favour a false charge against a man who is innocent."

Jurors are apt to sympathise with a witness who is unjustly attacked by counsel upon cross-examination, and in making up their verdict are often unconsciously influenced by such improper conduct upon the part of advocates. It is in vain that we deplore the fact that jurors are often influenced by passion or prejudice, and that they do not always follow the strict letter of the law, but, generally speaking, they mean to do what is right, and if they sometimes lean a little too far to the side of mercy, who can blame them? *See* Wrottesley p. 73.

## CHAPTER 12

### Lengthy Cross-Examination

The golden rule is to ask a few questions only. Specially in serious criminal cases so long as your case goes well do not ask unnecessary questions. In subordinate Courts there is a tendency on the part of the counsel to cross-examine at length. The Court has full power to control the cross-examination if it is carried on to an inordinate length.

"Sometimes lengthy cross-examination is the result of coming to examine a witness without adequate preparation. The advocate has to grope his way by surmising many things and making suggestions. The Judge naturally



likes to adopt the line of least resistance. He has seen that an attempt to overrule irrelevant questions is followed by a discussion which not only often takes a longer time and so he lets things take their course reserving to him the right to record or not to record what the witness says. This passive attitude cannot be supported. If he feels that a question is unnecessary or irrelevant, he ought to disallow it at once. Weakness is bound to be exploited on all occasions. A Judge has the right to ask how a question is relevant to the point in issue and when he is satisfied that the question is being pursued for question's sake, or for any unworthy motive, he ought to interfere. Of course there are men who will consciously drift into irrelevant topics, or enter into a parley with the witness however frequently they may be pulled up. They are incorrigible men and they can, if they so wish, make a Judge's life miserable every day. But they are exceptions and men like them are to be found in every sphere of life. The idea that it is better to let in some irrelevant things than to consume more time by interference, is productive of many evils. They will open out avenues for fresh cross-examination and when the Judge sits to write judgment he will find himself considerably embarrassed by the admission of irrelevant or inadmissible evidence. In criminal cases the admission of such evidence may do irretrievable injury. A witness ought not to be allowed to give hearsay evidence as it is impossible to remove the effect from the mind of the jury (7 W.R. Cr. 2; 2 W.R. 252).

It is not always safe that a Judge should freely interfere with the discretion of the counsel, while cross-examining the witnesses. But when the privilege is abused, it seems but right that the Judge should exercise some control over cross-examination assuming inordinate length; 4 C.W.N. 121, 16 C.W.N. 265, 104 I.C. 527. The general abuse of the privilege by recourse to lengthy cross-examination led the Calcutta High Court to issue a letter to the subordinate Courts (G.L. No. 14 of 1919) in the course of which it said: "It is of the utmost importance that judicial officers should keep in view the powers conferred upon them by the Indian Evidence Act and should exercise their discretion in using their power to disallow cross-examination on immaterial and irrelevant matter or needlessly lengthy cross-examination on relevant matter." See Sarkar's Modern Advocacy, p. 133.

Where a Court fixed arbitrary limit of 5 minutes for cross-examining a witness in an inquiry under S 133, a retrial was ordered. 67 I.C. 412; 22 Cr. L.J. 524. Where the Court is satisfied that the cross-examination of a witness is being unnecessarily prolonged, it can order it to be concluded within a certain time. 30 C. 625, 1924 P. 284; 72 I.C. 748. In criminal proceedings Magistrate should not allow lengthy cross-examination 117 I.C. 773; 30 Cr. L.J. 845; 1909 Sind 137. Protracted cross-examination with irrelevant questions must be deprecated. 1921 P.C. 69; 136 I.C. 102 continued irrelevancies and repetitions are not to be endured indefinitely. 1938 R. 412 40 Cr. L.J. 265. But great latitude should be given to Counsels although cross-examination appears to be lengthy and wide of point, which may prove to be of value subsequently. (1914) 10 Cr. A.P.P.R. 3. The Judge can always stop lengthy cross-examination. 1945 P.C. 41. If counsel is wasting time Court can stop him after 15 or 20 minutes. 1948 A 18.

### Illustrations

(1) A counsel was arguing for hours, when the Judge said, "You have said that before."

"Have I my Lord?" replied counsel, apologetically "I am very sorry; I forgot it."

"Don't apologize," was the judicial response, "it was so very long ago."

(ii) An American lawyer, who seemed unable to arrive at the end of a prolonged speech, at last ventured to express a fear that he was taking up too much time.

"Oh, never mind time," observed the Judge, "but for goodness sake, do not trench upon eternity." P.L.R. 1908, p. 36.

(iii) On one occasion when Mr. Bramwell was arguing a case in the Exchequer Chamber he had been much interrupted by the Judges. Chief Justice, Jervis, who presided, asked him when the time for the adjournment arrived, if he could conclude his arguments that day. He replied it depended on whether he was interrupted or not. The Chief Justice said it must be adjourned. Bramwell said that he hoped to finish in about an hour next morning. The Chief Justice as he was leaving said :—"Mr. Bramwell, you will not be interrupted to-morrow as the Judges will not be here." Mr. Bramwell had forgotten that the sittings terminated that day. 13 Cr. L.J. p. 107.

(iv) A counsel cross-examined a witness at great length. He had begun by asking the witness how many children she had and concluded by asking the same question. Before the witness could reply, Judge Darling remarked, "When you began, she had three." 25 M.L.J. 79.

The length of time in questioning may of course fitly be the subject of reasonable limits, fixed before hand if possible, and a mutual agreement as to time is often made. Cross-examination of a single witness was limited to three hours. Wigmore Ss. 783-784. Calcutta High Court issued instructions that cross-examination before a Commissioner appointed by Court will not exceed beyond specified hours. (*Vide Rule 295(I)*). Robert C. J. remarked in a case "when irrelevant topics are pursued at great length and persistence is shown in going over to the same ground again and again in the hope of making the witnesses appear discrepant, some limit must be placed on the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. If after several warning Advocate persists in abusing his position in this way, he may be directed to resume his seat, but only when the judge has enquired what are the material matters on which he still desires to cross-examine, so that no legitimate questions by him is shut out." 1938 R. 442. A protracted and irrelevant cross-examination not only adds to the cost of litigation but is a waste of public time. 1935 A. C. 346 (360).

## CHAPTER 13

### Silent Cross-examination

In criminal trials and especially in capital cases so long as your case stands well, ask but few questions, and be certain never to ask any, the answer to which, if against you, may destroy your client's case unless you know the witness perfectly well, and know that his answer will be favourable, or unless you be prepared with testimony to destroy him, if he play traitor to the truth and your expectations. See Paul Brown's Rule (4).

A lawyer should come to a point as soon as possible and it is always advisable not to ask questions rather than squash up a question in haphazard manner. Of all the duties of a counsel that of cross-examination is, in my opinion, the most difficult one in which to acquire proficiency. Few have excelled in it. It is a dangerous weapon, and the true art lies in knowing either where not to put any question at all, or the exact moment when to stop putting them. 13 Cr. L. J. 109.

It has been said by a lawyer of considerable experience that saying nothing will frequently accomplish more than hours of questioning. It is the client's interest rather than your own whims that you are to consider. 16 M. L. J. 35.

The golden rule is that a lawyer should not put any unnecessary or vexatious questions to please his clients.

Where the object of the client is merely to gratify his passions by unmerited abuse, by embarrassing or intimidating witnesses of whose veracity he has no real suspicion, or by conveying an impression of discredit which he does not actually feel, in all classes of this kind there is an imperious duty upon the advocate, who, while the protector of private right, is also the minister of public justice, which requires them to be repelled. "In my short judicial experience I have adjudicated in more than one case where the death sentence had to be confirmed, in which the conduct of the cross-examination had resulted in the proof of facts or statements palpably true and elicited quite unexpectedly from witnesses who had never volunteered the information and could not have been coached into it, which have just provided what was wanted to complete the case for the prosecution. In a criminal case, silence is sometimes more than golden." *Walsh's Advocate*, p. 167.

Terrell C. J. said: "It is no new experience to note that the art of advocacy is not practised in the defence in lower Courts in such a manner as to lead most directly to the acquittal of the client. Instead of seeking out the main points of the defence and in seeking to establish this by cross-examination, the cross-examination wanders about wholly irrelevant matters and the real criticism of the evidence for the prosecution is to be obtained by looking at the evidence in chief. The evidence given in cross-examination is not of the slightest value in the interest of the accused person." (*Raj Kumar v. E.*, 1928 Pat. 473—475).

Harris says: "With a very few exceptions, no cross-examination should be administered when the case is to go for trial. Instead of this course being pursued, a long cross-examination is often indulged in, or the young gentleman who thinks he is defending, puts as many questions as he can, under the impression that questioning is cross-examination, and then answers are elicited detrimental if not destructive to every chance of acquittal. For the purpose of convicting unfortunate wretches who are charged with offences, the government need not establish public prosecutors while young advocates defend, for these gentlemen can administer questions which the law forbids the prosecuting counsel to ask; and what is more, they *can privately* question the prisoner, and then by giving the information so obtained in the shape of questions to the witnesses, may display a knowledge of circumstances only consistent with the prisoner's guilt, as by showing that he was present at the scene of the crime, when probably the defence is to be an alibi!"

The infinite variety of types of witnesses one meets with, in Court makes it impossible to lay down any set rules applicable to all cases. One seldom comes in contact with a witness who is in all respects like any one he has ever examined before; it is this that constitutes the fascination of the art. The particular method you use in any given case depends upon the degree of importance you attach to the testimony given by the witness, even if it is false. It may be that you have on your own side so many witnesses who will contradict the testimony that it is not worth while to hazard the risks you will necessarily run by undertaking an elaborate cross-examination. In such cases by far the better course is to keep your seat and ask no questions at all. Much depends also as will be readily appreciated upon the age and sex of the witness. In fact, it may be said that the truly great trial lawyer is he who, while knowing perfectly well the established rules of his art, appreciates when they should be broken. If the witness happens to be a woman, and at the close of her testimony in chief it seems that she will be more than a match for the cross-examiner, it often works like a charm with the jury to practise upon her what may be styled the silent

cross-examination. Rise suddenly as if you intended to cross-examine. The witness will turn a determined face toward you, preparatory to demolishing you with her first answer. This is the signal for you to hesitate a moment. Look her over goodnatureedly and as if you were in doubt whether it would be worth while to question her and sit down. It can be done by a good actor in such a manner as to be equivalent to saying to the Jury, "What's the use? she is only a woman." See Wellman on the Art of Cross-examination pp. 126-127.

### Illustrations

(i) In this case the question was whether the accused was sane or insane at the time of the commission of the offence. One Dr. Hamilton had been retained by the defence and had made a special study of the accused's case, had visited him for weeks at the prison, and had prepared himself for a most exhaustive exposition of his mental condition. Upon calling him to the witness-chair, however, counsel for the accused (Mr. Howe) did not question his witness so as to lay before the Jury the extent of his experience in mental disorders, and his familiarity with all forms of insanity, nor develop before them the doctor's peculiar opportunities for judging correctly of the prisoner's present condition. The advocate evidently looked upon the advocates in charge of the prosecution as a lot of inexperienced youngsters, who would cross-examine at great length and allow the witness to make every answer tell with double effect when elicited in cross-examination by counsel for the crown. Counsel for the accused contented himself with these two questions and answers:

Q. "Dr. Hamilton, you have examined the prisoner at the Bar, have you not.?" A. "I have, Sir."

Q. "Is he, in your opinion, sane or insane." A. "Insane,"

"You may cross-examine," thundered the counsel with one of his characteristic gestures. There was a hurried consultation between the advocates for the Crown.

"We have no questions," remarked Mr. Nicoll, quietly.

"What," exclaimed Howe, "not ask the famous Dr. Hamilton a question? Well, I will," and turning to the witness began to ask him how close a study he had made of prisoner's symptoms, etc., when upon objection by the counsel for the prosecution, the Court directed the witness to leave the witness-box as his testimony was concluded, and ruled that, inasmuch as the direct examination had been finished and there had been no cross-examination, there was no course open, to Mr. Howe but to call his next witness." Wellman's Art of Cross-examination, pp. 77-79.

(ii) At a trial for murder, a Welsh advocate was instructed for the defence by one of the leading local practitioners. The counsel was a very peremptory little man, and during cross-examination he declined to put a certain question suggested by the gentleman instructing him. The solicitor pressed him again and again on the point, but still he refused. "Well, Sir," said the solicitor at last, "these are my instructions, and mine is the responsibility, therefore I insist upon your putting the question." "Very well," said the barrister, "I will put the question, but remember, as you say, yours is the responsibility." The question was put, and the result was that it contributed in a large degree to implicate the prisoner. The sentence having been pronounced the barrister turned round in a fearful rage to the solicitor and exclaimed: "When you put your client in hell, which you undoubtedly will, you will be kind enough to him it was your question and not mine." See Wellman.

(iii) In this case a young woman of somewhat prepossessing appearance was charged with poisoning her husband. They were people in a humble class of life, and it was suggested that she had committed the act to obtain possession of

money from a burial fund, and also that she was on terms of improper intimacy with a young man in the neighbourhood. A minute quantity of arsenic was discovered in the body of the deceased, which, in the defence, was accounted for by the suggestion that poison had been used carelessly for the destruction of rats. The Judge, Mr. Baron Parke, charged the jury not unfavourably to the prisoner, dwelling pointedly upon the small quantity of arsenic found in the body, and the jury without much hesitation acquitted her. Dr. Taylor, the Professor of Chemistry and an experienced witness, had proved the presence of arsenic, and, to the great disappointment of the solicitor, who desired a severe cross-examination, counsel for accused did not ask him a single question. He was sitting on the Bench and near the Judge, who, after he had summed up and before the verdict was pronounced, remarked to him that he was surprised at the small amount of arsenic found; upon which Taylor said that if he had been asked the question, he should have proved that it indicated under the circumstances detailed in evidence that a very large quantity had been taken. The professor had learned never to volunteer evidence, and the counsel for the prosecution had omitted to put the necessary question. Mr. Baron Parke having learned the circumstances by accidental means, did not feel warranted in using the information and this is a good lesson in the art of silent cross-examination.

(iv) In a case tried on circuit, before Lord Justice Thesiger, the cross-examining counsel had muddled up some part of the case, which was greatly in his favour.

The counsel on the other side was addressed by his Lordship.

"No, question Mr. . . ."

"No question, my Lord," said the counsel for the other side, and he won his case.

When the counsel was dining with his Lordship that night the Judge said, with grave innocence, "I thought, you would have cleared up that matter in re-examination in the interests of justice."

"The interests of justice, my Lord," said the counsel, "were the interests of my client. I could not cross over to the other side without his consent, as he had not retained me to hold a brief for his opponent." The Lord Justice thought there was something in the observation. *Harris' Illustrations in Advocacy*, p. 106.

## CHAPTER 14

### Compound, Misleading, Dubious and Improper Questions

Sometimes compound questions are put to the witnesses in such a manner that a part of it warrants an answer in the affirmative and a part of it in the negative. The counsel, if he wants an affirmative answer, will end the question by that portion to which the witness can only say "Yes." Such questions should be disallowed. Similarly equivocal questions should be disallowed. Many advocates who use words of "learned length and thundering sound," in their questions to witnesses would do well to adopt a more homely and less truculent style. Witnesses are more at home when questioned in this way, and the jury will understand what is said, as well as the Court and opposing counsel, for men never become so learned that they cannot understand simple language better than any other. *Wrottesley on Examination of Witnesses*, p. 72.

Sometimes the lawyers ask their questions in such a roundabout way that you cannot tell what the answer really means. A lawyer once asked a witness what he knew about Mr. so and so's character for running after bad women. The witness said:—"I never knew anything, to the contrary," and the lawyer let the answer go like that. In the jury room there was much discussion and great

difference of opinion as to whether the witness said Mr. so and so ran after women or not. 20 M. L. J. p. 479.

Sometimes witnesses speak words which they think are true to the letter, but which certainly are not true in fact or in spirit. The following is a method that may well be adopted in the cross-examination of such a witness. In this case Sir Charles Mathews appeared as prosecuting counsel against a solicitor charged with having forged the will of a dead lady. For the defence, a woman swore that she had seen the lady, who was ill in bed at the time, sign the will. She added that the solicitor handed the deceased lady the ink and pen with which to sign. "Did he touch her hand?" demanded Sir Charles.

"I think he did just touch her hand," the witness replied.

"When he did touch her hand," proceeded Sir Charles, and in an instant his voice rose and became harsh and terrible, "was she dead?" Turning deadly pale the witness seemed to struggle for breath, swayed in the box, and fainted. The solicitor had taken the hand of the dead woman and with it had written her name to the forged will. 27 M. L. J. 130.

So often witnesses are required to answer "yes" or "no," to a question which in form is single, but in fact is double. In such a case it would be impossible for the witness in all fairness to answer "yes" or "no". It is then the duty of the Judge to have the question split up into its component parts and then require the witness to answer "yes" or "no" to each part.

As an example of such an unfair question, an eminent Judge says: "In the same way, if knowing the probity of a Judge, any one should ask me if he sold justice, still I could not reply by simple saying 'no,' since the word 'no' would signify that he did not sell it now, but would leave it to be inferred, at the same time, that I allowed that he had formerly sold it. To this class belong such questions as: 'When did you cease to be enemy of the plaintiff?' 'When did you sell your interest in this claim?' 'When did you retire from the conspiracy?' 'When did you cease beating your wife?' Wrottesley on Examination of Witnesses, pp. 96-97.

Regarding such questions Aristotle says: "Several questions should be at once decomposed into their several parts. Only a single question admits of a single answer." It is a common practice for some not over-scrupulous advocates to ask unfair questions. Even so grant and usually so fair an advocate as Erskine was admonished to give the witness fair play. Fair play every witness is entitled to, and fair play the counsel who calls him should see that he gets. It is no unusual thing to assume that the witness has made a statement that he did not make, and, on this false assumption, harass and confuse him. A witness, be it always remembered, is not generally self-possessed under the fire of hot cross-examination, and may be bewildered by such assumptions made, as most often it is, with a dogmatic and determined air. Such assumptions counsel have no right to make." Hardwicke on the Art of Winning Cases, p. 179.

Questions which assume facts to have been proved, which have not been proved, or that particular answers have been given which have not been given, will not at any time be permitted (Tay, S. 1481). A question which assumes a fact that may be in controversy is leading when put in direct examination, because it affords the willing witness a suggestion of fact which he might otherwise not have stated to the same effect. Similarly such a question may be improper on cross-examination, because it may by implication put into the mouth of an unwilling witness, a statement of fact which he never intended to make and thus incorrectly attribute to him testimony which is not his. Wigmore, S. 780.

**Assumptions.**—Every witness must be allowed to have fair play. It is unworthy of an advocate to attempt to corner a witness by putting a question which involves an assumption that he or another witness has made a statement that has not been made. Very often witnesses are puzzled by questions in which assumptions of facts are covertly made, lest the trick be detected when questions are direct. Under this head come questions like these: ‘When did you cease beating your wife?’ ‘When did you cease to be enemy of the plaintiff?’ ‘When did you stop communicating with him?’ ‘Do you go there still?’ ‘Does he bear ill-feeling even now?’ ‘When did you sell your interest in the claim?’ ‘When did you retire from the conspiracy?’ The authors of the *Port Royal Logic* give this example: “In the same way, if, knowing the probity of a Judge, any one should ask me if he sold justice still, I could not reply by simply saying ‘no,’ since the ‘no’ would signify that he did not sell it now, but would leave it to be inferred, at the same time, that I allowed that he had formerly sold it.”

A compound question one part of which is admissible and the other inadmissible may rightly be excluded as a whole. Woodroffe’s *Evidence* 9th Ed. 979.

Another unfair practice is to demand a categorical answer—‘Yes’ or ‘No’—by putting a question which is really composed of several parts admitting of different answers. The authors of the ‘*Work of the Advocate*’ say: “This is an old fallacy, and ought to be so well known as to be readily exposed, but it does, nevertheless, yet do no little mischief. Many a witness has been sorely puzzled by being required to answer ‘yes’ or ‘no’ to a question which in form is single, but in fact double. Thus a witness is asked: ‘You hurt yourself by jumping off a train running forty miles an hour?’ Or, he is asked: ‘You paid the money to the plaintiff’s agent?’ Or, again, he is asked: ‘You were the plaintiff’s partner in this venture?’ If the one to whom are addressed questions so plainly double were cool and collected, doubtless he would not be misled; but few witnesses can be cool and collected while under cross-examination, and they are often betrayed into error. A witness who has an advocate demanding of him, ‘answer yes, or no, sir,’ is not in a condition to clearly perceive the unfairness of the question asked him. Nor are the questions ordinarily asked of witness so plainly double as those we have given by way of illustration, for many are so adroitly constructed as to deceive keen thinkers. The remedy for this evil is that proposed by Aristotle. ‘Several questions,’ he says, ‘should be at once decomposed into their several parts. Only a single question admits of a single answer.’ (*Work of the Advocate*, pp. 334-335).

It is not infrequently found that a witness is embarrassed by putting questions as to the effect of evidence given by himself or other witnesses. Such questions do not serve any useful purpose. A witness should only state facts within his knowledge and he should not be drawn into a controversy and allowed to venture his opinion on the effect of evidence. This matter formed the subject of comment in the recent case of *R. v. Baldwin*. The *Law Journal* remarked; “In the case of *Rex v. Baldwin*, reported in the *Times* newspaper of Tuesday last, the Court of Criminal Appeal addressed some elementary, but much-needed remarks to the world at large as to the inaptitude, to say the least, of a particular type of question very frequently put to witnesses these days. The reference was to the interrogation which invites a witness to state facts not within his cognizance, but the effect of evidence already given, whether by himself or by others; and a typical form of it was quoted: ‘Is your evidence to be taken to suggest . . . ?’” Apart from the special class of witnesses known as “expert” it is, of course, a first and universally recognised



rule that the function of the witness is to state facts within his knowledge ; it is no more his function to review his own or anybody else's evidence than it is to comment upon the law applicable to the case." (*Law Journal*, London, p. 260, March 21, 1925).

**Indecent, Scandalous or insulting questions:**—S. 151 Evidence Act lay down that "The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed."

**It follows that.**—If the indecent or scandalous question or inquiry relates to a fact in issue or to a matter necessary to be known in order to determine whether or not a fact in issue existed, the Court has no jurisdiction to disallow the question or inquiry. 18B. 468, 20 Cr. L. J. 566. The mere indecency of disclosures does not suffice to exclude them, where the evidence is necessary for the purposes of civil or criminal justice. *e.g.* in cases of rape, or adultery, and cases where the legitimacy of a person is in question. But if the indecent or scandalous question or inquiry does not relate to a fact in issue, or to a matter necessary to be known in order to determine whether or not a fact in issue existed, the Court has a discretion to allow or disallow it, even if the question or inquiry has some bearing on the questions before the Court. Thus, where the indecent or scandalous question relates to a "relevant fact", as distinguished from a "fact in issue", the Court may disallow it if it considers that the question does not relate to a matter necessary to be known in order to determine whether or not a fact in issue existed. Similarly, indecent or scandalous which are asked merely to impeach the credit of a witness may be disallowed by the Court. 20 cr. l. j. 566. Thus, a question to a female witness whether she had become pregnant by a certain person is improper, if the object in asking the question be to impeach the credit of the witness. 1923 c 315.

S. 152 Ev. Act lays down that "The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form." For illustrations on this point *See* chapter 7 *Supra*.

## CHAPTER 15

### Avoid Legal and Technical Expressions

Sometimes lawyers use technical expressions and legal words which are not ordinarily understood by a layman. Instead of using words of "learned length and thundering sound" in their questions to witnesses, advocates will do well to adopt a more homely and less truculent style. In this way the witnesses feel more at home and the Judge and the jury appreciate the language better than any other. The lawyers sometimes assume that an ordinary layman can fully understand a legal expression, but experience shows that majority of the people have absolutely no notions about even the very common legal expressions.

### Illustrations

(i) The ignorance of semi-educated clients affords a merriment at times. Several years ago I remember a gentleman coming to me to consult me on a question of law. He had a smattering of English education, and what he came for was an opinion on a point under what he called the Suits of Violation Act. He, of course, meant the Suits Valuation Act, and he little knew what a source of innocent mirth he was to his hearers whenever he mentioned the name of Act, 33 M. L. J. 103,



(ii) A man was being examined with reference to his qualifications as a juror in an important case, involving a considerable sum of money.

Q. "You understand," said the lawyer, "what is meant by a preponderance of evidence?" A. "Yes, Sir,"

Q. "Let me have your idea of it." A. "I understand it, I tell you."

Q. "Well, what is it?" A. "Why, anybody can understand that."

Q. "I would like to have your definition of it." A. "I know what it is," replied the man, hotly. "When I tell you I know what a thing is, I know it. That is all there is about that."

Q. "Well, what was the question I asked you?" A. "You ought to know what that was. If you have forgotten your own questions don't try to get me to remember them for you."

"I don't want to hear any more of that kind of talk" interposed the Court, "Answer the questions addressed to you by the counsel."

A. "Judge, I did. He asked me if I knew what it was, and I said I did."

Q. "Are you sure you understand what is meant by the term, 'preponderance of evidence'?" asked the Court, sharply.

A. "Of course I do, Judge."

Q. "Define it, then." A. "It's evidence previously pondered." 21 M. L. J. 34.

(iii) "A witness when asked to explain the Latin terms *de facto* and *de jure* replied: "They mean that you must prove the facts to the satisfaction of the jury," 17 M. L. J. 161.

(iv) In an American case, a police officer testified that, in his belief, a boy complained of for a minor offence was insane.

Q. "You mean he is *non-compos mentis*?" asked the Magistrate.

A. "I don't believe I understand," said the policeman.

Q. "What! you don't know what *non-compos mentis* means? How long have you been in the police force?" A. "Twenty-five years."

Q. "A detective of twenty-five years, and don't know what *non-compos mentis* means?" A. "Yes; if I understood that language I would not be a policeman," was the witness's retort, 16 M. L. J. 127.

(v) In one case, the cross-examining counsel had kept the witness on the stand for some time and the witness naturally was getting weary.

"If you would only answer my questions properly," said the cross-examiner, "we would have no trouble. If I could only get you to understand that, all I want to know is what you know."

"It would take you a lifetime to acquire that," interrupted the witness.

"What I mean is that I merely want to learn what you know about this affair," the lawyer said, frowning. "I don't care anything about your abstract knowledge of law or your information in regard to theosophy, but what you know about this case."

"Oh, that isn't what you want" said the witness in an off-hand way. "I've been trying to give you that for some time, and..."

The lawyer got in an objection and the witness had to stop.

"If I don't want to know what you know about this particular case and nothing else," inquired the lawyer later, "what do you think I do want to know?"

That seemed so easy that the witness laughed as he said,

"It is not what I know that you want to know; it is what you think I

know that you are after, and you are trying to make me know it or prove me a liar." 15 M. L. J. 24-25.

(vi) In a case, cross-examining a witness, counsel asked—

Q. "When you said you were 'satisfied' just now, you meant, I suppose, that you were content?" A. "I did not."

Q. "Well, satisfied and content are just the same, are they not?" A. "They are not."

Q. "Well, suppose you explain to the Court and jury what the difference is?" A. "Sure, I will, now, for instance, I might be satisfied that it was you I saw out behind the barn kissing my wife Nora, but I'd be far from being content." 18 M. L. J. (Jour). 366—377.

(vii) "Now," said the lawyer who was conducting the cross-examination, "will you please say how and where you first met this man?"

"I think," said the woman with the sharp nose, "that it was—."

"Never mind what you think," interrupted the lawyer. "We want facts here. We don't care what you think and haven't any time to waste in listening to what you think. Now please tell us where and when it was that you first met this man?"

The witness made no reply.

"Come, come," urged the lawyer, "I demand an answer to my question."

Still no response from the witness.

"Your Honour," said the lawyer, turning to the Court. "I think I am entitled to an answer to the question I have put."

Q. "The witness will please answer the question." A. "Can't."

Q. "Why not?" A. "The Court doesn't care to hear what I think, does it?"

Q. "No." A. "Then there's no use of questioning me any further. I am not a lawyer. I can't talk without thinking." 8 M. L. J. 243.

## CHAPTER 16

### Never Allow a Witness to be Witty or Refractory

If the witness wants to be witty or refractory with the cross-examiner, the counsel should always settle with him first by some good natured or humorous remark and then proceed with the cross-examination. Care should always be taken that the counsel should not lose his temper. If a counsel gets angry, it is a sure sign that he is going to be defeated in the intellectual duel.

### Illustrations

(i) Sir Edward Carson once began his cross-examination of an offensive witness thus:

Carson :—"I believe you are heavy drinker?"

Witness :—"That is my business."

Carson (without a moment's hesitation).—"Have you any other?"

It is needless to say that the promptness of the questions, and the laughter which followed, put the witness completely at counsel's mercy.

(ii) A director of some doubtful company was being cross-examined by Sir Frank Lockwood. The director was giving evidence bearing upon a rather shady history, when Sir Frank put the questions to the promoting director; "Now, tell me, Sir, when did you first determine to float this company?"

"Float this company?" asked the witness, with some surprise, "I don't know what you mean by floating the company."

"Very well, then," replied Sir Frank, "I will make my meaning perfectly clear. By floating the company I refer to the operation which almost invariably precedes the sinking of a company. Do you understand me now?"

(iii) One Mr. Brown was suing for damages for injuries, and was being cross-examined by Duke, K.C.

Q. "I gather that you did not see nor hear the approaching vehicle?"

A. "Not I. Why, the first thing I see or hear was the wan a-top of me. I was being scrunched before I knew where I was."

Q. "I understand. You say you neither saw nor heard the approaching vehicle?" A. "That is right. Not I—never at all."

Q. "You were overtaken opposite the post office, I believe?" A. "Yes, I was in the middle of the road."

Q. "What were you doing that you did not see or hear the approaching vehicle?" A. "Nothing, look here."

Q. "Answer my question, please." A. "Nothing, but having a bit of a lark with one or two others."

Q. "Having a bit of a lark? Do you mean, you were dancing on the pavement?" A. "Perhaps I was, perhaps I was not."

Q. "Were not you dancing on the pavement with a young lady when the vehicle came round the corner thirty yards away?" A. "Perhaps I was, I say, perhaps I was not."

Q. "And didn't the young lady run away from you?" A. "I don't say nothing."

Q. "And did you run after her and so into the vehicle?" A. "Perhaps"

Q. "Answer the question please." A. "Well, what right had the cart to be there, I ask?"

*Counsel*:—"The jury will tell you. Thank you."

## CHAPTER 17

### Never Lose Temper in Cross-Examination

The first qualification of good advocate is that he should keep cool and calm and should never lose temper under any trying circumstances.

The golden rule of all cross-examination is, never lose your temper. There is no time in the practice of the profession, there is no incident in the history of your lives that requires a more calm, a more cool and collected mental condition, than that in which the cross-examiner is placed. Don't expect a witness to fall into any trap, no matter how skilfully it may be prepared. Don't expect that you are going to smash any witness and when I use the word 'smash' I use it in the ordinary colloquial term spoken of by lawyers in conducting a vigorous cross-examination. The man who goes into the Court with his brief, I care not how eminent a counsel he may be, I care not what his experience may be, I care not how good a case he may have, if he goes into a Court with the idea in his head that he is going to smash a witness by cross-examination, that man retires from the field, defeated in nine cases out of ten, and perhaps in a larger percentage. Witnesses are knowing people; they are crafty; they know more about their affairs and what they are talking about than you or I do; they have lived with them, they are people who are very quick of observation, and they

have a certain amount of cunning, and that cunning the most careful counsel sometimes is unable to circumvent, even when the Court and the counsel are both convinced that the witness is not telling the truth, 20 M.L.J. 368-369. It has been said that a lawyer should preserve his self-control, and wear it like a coat of mail. 14 Cr. L.J., p. 23. "Whatever you do, don't lose your temper. Just hold it. Keep cool. If you cannot keep cool anywhere else, keep cool in the Court-room." 12 M. L. J. p. 371. "Preserve an even temper and a respectful attitude, but at the same time go on firmly and persistently; do not swerve from the straight path." 21 M. L. J. 133. "Do not lose your temper and go out and abuse the Judge. If you think the Judge is wrong, it is your duty to advise your client to take his case to a higher Court, but do not give vent to your spite on the Judge and call him names." 21 M. L. J. 133. If you keep cool, you will command everybody. To be angry is to revenge the faults of others on ourselves. It has often been observed that men often make up in wrath what they want in reason. Violence in the voice is often only the death rattle of reason in the throat. A young lawyer is generally a creature of impulse, emotion action than reason. Reason is a very late development. A lawyer without reason can not get on even for a day.

### Illustrations

(i) Addressing Mr. Spooner, a famous Advocate, who had lost a case in spite of his best efforts, a brother Advocate said "I see, Spooner, that the Supreme Court has overruled you in the case of *Smith v. Jones*. But you, Spooner, need feel no concern about your reputation."

Mr. Spooner chuckled and made the following answer :—"Quite so, I agree. I am only concerned for the reputation of the Supreme Court." 27 M.L.J. p. 156.

(ii) The following is an instance of great calmness and self-possession combined with fine tact and ready wit by counsel :—"Few people who were present will forget the dramatic outburst of Snowden when on his trial for the murder of Miss Barrow. In vehement tones and with hand uplifted, the murderer declared, "I swear before God, that these are the words that were used."

Great as was the effect of the dramatic utterance on the jury, it was all destroyed by the quiet reply of Sir Rufus Isaacs.

"Mr. Snowden," he said, "all the statements you have been making are statements before God." 27 M. L. J., p. 131.

### In Examination-in-Chief

One rule that should never be violated is, that under all circumstances the advocate should keep cool, and not lose his temper. No matter how stupid the witness, or how unexpectedly damaging his testimony, or how exasperating the conduct of opposing counsel, or how erroneous he may think the rulings of the Court on questions of evidence, the advocate should show no more signs of discomposure than if he were a graven image. For aside from the fact that juries attach much importance to the effect of damaging testimony upon lawyers engaged in the trial of the case, if the advocate loses his temper he may say or do something fatal to his case, and to his reputation as an advocate. There are times when indignation should be expressed, but the advocate must keep within bounds, and deport himself with dignity, never forgetting the respect due the Court from himself as one of its officers, and never forgetting the respect due the office of advocate which his opponents hold as well as himself.

If a witness is inclined to be pert or forward, the advocate should treat him gravely and distantly, and show him by his tone and manner that his levity or insolence is out of place in the Court-room, and that no trifling will be allowed.

If an advocate finds that a witness whom he has called is treacherous and unfriendly, there are two courses which he may pursue. One is not to appear to distrust him, and dismiss him as soon as possible, and the second is to open fire upon him and make him show his bias or prejudice. Both methods have their advantages and their disadvantages, and sometimes it is best to pursue one course and sometimes the other. Perhaps the former course is best if the witness is defiant, unscrupulous, and intelligent, the latter, if he is not naturally inclined to be combative. But it is better, if the advocate suspects that a witness may prove treacherous, to have a signed proof from him signed if possible in the presence of reliable witnesses with which to confront him in case it should prove necessary, and the Court should permit it. *See Wrottesley p. 39.*

It is advisable to provoke your own witness to the exhibition of his true feelings if he is trying to help the opposite party. Reject his approaches with indignation and let him know that you are not to be imposed upon. Adopt this method when witness does not assume frank and friendly mien in the witness box.

## CHAPTER 18

### Repeating Questions in Cross-Examination

Repeating the same question is generally not tolerated by the Judge. It is considered as waste of time. But a skilful cross-examiner can by mere repetition exact the truth and expose a lie. It depends largely on a deep moral basis. "Unless there be a doubt as to what an answer was, you do not require it to be given twice. *"Let well alone,"* said a Judge to a junior who was so enamoured with a witness's answer that he must needs hear it again and again. There is also a danger of the witness varying his answer unconsciously if you ask him again and again. You need not give him a second run for the purpose of going over the same ground again. Having got the answer you want, keep it and at once go off upon another point; otherwise, if you ask him to repeat it for the purpose of directing attention to the good point you have made, he will qualify what he has said, and very likely unsay it altogether by some lying explanation. Give him no opportunity of wriggling out of what he has sworn. That is the business of your opponent, not yours. It might be here observed, that *whenever you have once fairly caught your witness, don't sacrifice the advantage by exhibiting him too ostentatiously.*" *See Harris, p. 73.*

"Don't repeat yourself," is a good advice. But you must repeat your points until the Jury have taken them. The way to do this is to put them with a change, of language and in a different form. By this means the Jury will be diverted instead of disgusted. Nothing is more pleasant than variety; nothing more entertaining than looking at an interesting object from different standpoints, especially when you want to understand something of its general features, and to render some aspect of it invisible. But, asks an anxious enquirer, how am I to know when the Jury have taken the point? The answer is simple: "Watch your float." *See Harris, p. 331.*

Cox says:—"Difficulty is sometimes experienced by an advocate from the impatience of the Judge at repetitions of the same questions. Too often he is met with the remark, 'Mr., you have asked that question before' or, 'the witness has already told you.' This is doubly disagreeable, for besides putting you on all terms with the Court, it disturbs your plans, and sets the witness on his guard. There is nothing of which the Bench is so little tolerant as of the repetition of the same question, and yet there are few more effective methods of detecting falsehood. The witness answers. You note his answer. You pass away to some distant part of the story, or some foreign transactions. You then, on a sudden

return, when his thoughts are otherwise engaged, when probably he has forgotten his first answer, if it was false, you obtain a different one, which instantly betrays him. Often we have seen witnesses proof against all other tests fail before this one. When your design is distinctly this, and not merely a vague, purposeless interrogation, proceed respectfully, but firmly, to show that you have a meaning, and your aims will come soon to be understood and respected by the Court."

Wigmore on Evidence observes as follows:—" (1) Repeating an unanswered question upon an inadmissible point, already ruled out by the court, is of course an impertinence to the court; and, while it may sometimes become desirable and allowable to renew an offer of testimony in approximately the same form, in order to secure its admission after obviating its original defects, this attempt, made in good faith, is to be distinguished from a merely persistent effort to elude the vigilance of opponent and Judge by repeating precisely the same forbidden offer, for this is at once useless, wasteful and disrespectful. See 55 N. W. 251. (2) Repeating an allowable question already once answered or covering the same ground of facts as other questions, on the direct examination, is ordinarily superfluous and therefore improper. Nevertheless, circumstances may arise which make it desirable to emphasize certain facts anew; and the trial court's discretion should control. 56 N. E. 353. (3) Repeating the same testimonial matter of the direct examination, by questioning the witness anew on cross-examination, is a process which often becomes desirable in order to test the witness's capacity to recollect what he has just stated and to ascertain whether he falls easily into inconsistencies and thus betrays falsification. In spite of its frequent tedium and unskilful handling, this process often proves useful; and the discretion of the trial court must suffice to fix its limits. Ordinarily a question once answered cannot be allowed to be repeated. Repeating an unanswered question upon an inadmissible point, already ruled out by the Court, is an impertinence to the Court; whereas repeating an allowable question already once answered, or covering the same ground of facts in other questions, on the direct examination, is ordinarily superfluous and therefore improper. But repeating the same testimonial matter of the direct examination, by questioning the witness anew on cross-examination, is a process which often becomes desirable in order to test the witness's capacity to recollect what he has just stated and to ascertain whether he falls easily into inconsistencies and thus betrays falsification. In spite of its frequent tedium and unskilful handling, this process often proves useful and the discretion of the trial Court must suffice to fix its limits. Repeating precisely the same question in cross-examination, after it has once been answered, not only savours of intimidation, but also tends to waste time. Nevertheless, when used sparingly and against a witness who in the cross-examiner's belief is falsifying, there ought to be no judicial interference; for there is perhaps none of the lesser expedients which has so keen and striking an efficacy, when employed by skilful hands, in extracting the truth and exposing a lie. By this process, the witness, sometimes by sheer moral force, is compelled to admit the truth. See Wigmore, S. 782. There is many a precedent illustrating the efficacy of this process, but *Queen Caroline's Trial* perhaps illustrates it best. In attempting to prove an act of adultery at Naples, between the Queen and her servant Bergami, one of the material facts alleged by the prosecution was that the Queen's sleeping room adjoined Bergami's with only a corridor and a cabinet intervening, and that there was no access from the Queen's room to Bergami's except by that passage. To this servant Majocchi, who for a time slept in the cabinet mentioned, testified as follows, on being asked by Mr. Solicitor-General Copley (afterwards L. C. Lyndhurst) whether there was no other intervening passage: "There was nothing else. One was obliged to pass through the corridor to the cabinet, and from the

cabinet into the room of Bergami. There was nothing else." Then, on his cross-examination, Mr. Brougham asked as follows: "Will you swear there was no passage by which Her Royal Highness could enter Bergami's room when he was confined with his illness, except by going through the room, i.e. cabinet where you slept?" Majocchi: "I have seen that passage; other passages I have not seen." Mr. Brougham: "Will you swear there was no other passage?" Majocchi: "There was a great saloon, after which there came the room of Her Royal Highness, after which there was a little corridor, and so you passed into the cabinet. I have seen no other passage." Mr. Brougham: "Will you swear there was no other passage?" Majocchi: "I cannot swear. I have seen no other but this; and I cannot say there was any other but this." Mr. Brougham: "Will you swear that there was no other way by which any person going into Bergami's room could go, except by passing through the cabinet?" Majocchi: "I cannot swear that there is another; I have seen but that; there might have been, but I have not seen any, and I cannot assert but that alone." Mr. Brougham: "Will you swear that if a person wished to go from the Princess', i.e. Queen's room to Bergami's room, he or she could not go any other way than through the cabinet in which you slept?" Majocchi: "There was another passage to go into the room of Bergami." Mr. Brougham: "Without passing through the cabinet where you slept?" Majocchi: "Yes."

### Illustrations

(i) In Count Coningsmark's Trial, the Count charged with murder, was said to have absconded in disguise; and a Swedish fellow-country-man of his, at whose house he had changed his clothes, was called. The cross-examination was as follows:

Q. Pray, what did the Court say to you about his coming in disguise to your house?" A. "He said nothing, but that he was desirous to go to Gravesend; I helped him to a coat, stocking and shoes."

Q. "Then I ask you, what did he declare to you?" A. "Why, he did desire to have those clothes."

Q. "You are an honest man to tell the truth?" A. "He declared nothing to me."

Q. "Did he desire you to let him have your clothes, because he was in trouble?" A. "He desired a coat of me, and a pair of stockings to keep his legs warm."

Q. "I do ask you, did he declare the reason why he would have those clothes was because he would not be known?" A. "He said he was afraid of coming into trouble."

Q. "Why were you unwilling to tell this?" See 'Horwells' State Trials, p. 55.

(ii) The accused was charged with the offence of having abducted and committed rape on a girl by name Sarah Woodcock. The evidence of several witnesses, however, showed plainly that the case was in truth one of willing seduction. But the complainant testified flatly that force and coercion was used on her person by the accused. Her evidence was suspiciously inconsistent in several particulars. In the course of her examination in Court, the woman wanted to understate her age, so that the Jury might believe her version of the case. The following is a portion of the questions put and answers elicited in her cross-examination by the accused:

Q. "How old are you?" A. "I am twenty-seven."

## REPEATING QUESTION IN CROSS-EXAMINATION

Q. Will you swear you are no older?" A. "I will swear I am twenty-eight."

Q. "Will you swear you are no older?" A. "I will swear I am that."

Q. "Will you swear you are no older?" A. "I do not know I am twenty-nine, and that is my age. I cannot exactly tell."

Q. "To the best of your belief how old are you?" A. "I believe I am thirty next July. I cannot be sure of that whether I am or no." *See Lord Baltimore's Trial*, Gurney's Rep., p. 77.

(iii) The accused in another case was a young boy of eleven years of age. He was indicted for felonious larceny. A witness, one Isaac Barney, a patrolman, was called in to swear to a confession by the boy when under arrest. The cross-examining counsel wanted to profit by a reward which was offered on the conviction of this boy. The following is a portion of the cross-examination of this witness:

Q. "You had frightened this poor child out of his senses?" A. "I do not think he was afraid."

Q. "Do you know what reward there is for the conviction of this poor infant?" A. "Upon my oath I do not know."

Q. "Do you mean to say that you, a patrol, do not know?" A. "I am sure it is a thing I never had."

Q. "You shall not slip through my fingers so." A. "Upon my word of honour I do not know."

Q. "Upon your oath, Sir?" A. "I do not."

Q. Did you never hear that there was a reward of forty pounds upon the conviction of that child?" A. "I never knew any such thing."

Q. "But you have heard it?" A. "I never heard any such thing."

Q. "Come, come, Sir, it is a fair question and the Jury see and hear you. Upon your oath, did you never hear that you would be entitled to forty pounds as the price of that poor infant's blood?" A. "Your honour, I cannot say."

Q. "But you shall say before you leave that place." A. "I have heard other people talking about such things."

Q. "So I thought, and with that answer, I leave your testimony with the Jury." *See Horton's Trial*.

(iv) In the Parnell Commission proceedings, the Irish Land League was charged with complicity in crime and agrarian outrage; the fact of crime and outrage it admitted, but denied any complicity, and placed the responsibility on certain lawless secret societies of local origin; the issue turned largely on the identity of these societies with the league; many witnesses testified to meetings of lawless societies and the inference expressed or implied was that these were Land League branches; the murder of Lord Mountmorres was under inquiry, and one Michael Burke, a shifty witness, having a bad record, testified to the concocting of the murder at such a meeting held in one Pat Kearney's house. "I know Pat Kearney; he keeps a public house at Clonbur; he was Secretary to the Land League, I believe. The Land League meetings were held in his house sometimes."

Q. "Before Lord Mountmorres was murdered, was there a meeting held at Pat Kearney's house?" A. "There was a kind of meeting held, Sir."

Q. "Just tell us what the talk was." A. "It was spoken of that he (Lord Mountmorres) should be done away with."

This was direct enough that the Local Land League branch had at a meeting plotted Lord Mountmorres' murder, but on cross-examination, Sir



Charles Russell, after bringing out the witness's bad record and involving him in several shifty answers, finally returned to the meat of the testimony, namely, whether the meeting was a Land League meeting at all; after getting the witness to admit that he was not sure whether the meetings were league meetings, the cross-examiner continued:

Q. "Now, tell me, will you swear there was a Land League at all at Clonbur in 1880?" A. "I will not swear whether there was or not; but I was told there was, by several people."

Q. "Who told you?" A. "Several people."

Q. "Who told you there was a Land League branch in Clonbur?" A. "I was told by several people, but I could not swear by whom."

Q. "Will you swear there was any branch of the Land League at all in Clonbur before Lord Mountmorres' death?" A. "I was told there was."

Q. "Who told you there was a Land League in Clonbur?" A. "I can only—"

Q. "Attend to me; who told you there was a Land League at Clonbur?" A. "Several people, Sir."

Q. "Attend who—if anybody—told you there was a Land League branch before Lord Mountmorres' murder?" A. "I can only—"

Q. "Will you swear anybody told you?" A. "I could not swear what were the men's names, but I was told, by several people."

Q. "Attend to me; will you swear you were told by anyone before Lord Mountmorres was murdered that there was a Land League branch at Clonbur?" A. "There was some kind of branch; I could not swear what branch it was. I know there was a branch."

Q. "Will you swear, on your oath, that any one told you there was a branch of the Land League in Clonbur, before Lord Mountmorres was murdered?" A. "I was told," but I do not know the name of the man."

Q. "Attend to me, I will have an answer." A. "Not to that question, because I cannot answer it; I have said all I know."

Q. "Attend to me." A. "I am attending as well as I can."

Q. "Will you swear anyone told you before Lord Mountmorres was murdered that there was a Land League branch at Clonbur?" A. "I was told there was a branch, but I could not say what it was; I could not say whether it was a Land League branch or not."

Q. "Why did you not tell me so before?"

The above example of repeating precisely the same question on cross-examination, in order by sheer moral force to compel a witness to admit the truth, after an original false answer or refusal to answer, is a process which not only savours of intimidation and browbeating, but also tends to waste time. Accordingly it is not doubtful that the trial Court has discretion to refuse or to allow this, as seems best under the circumstances. 1875, *Wesley, v. State*, 52 All, pp. 182—188.

If the witness has not understood the question, he can demand as of right to have the question repeated once. Twice or ever thrice. Such a course should be allowed only if the witness really does not understand the question. The order of the court that each question should be repeated three times irrespective of the fact that witness understood the question can not be justified. 1938, p 288=39 Cr. L. J. 527.

## CHAPTER 19

## Do Not Distort Facts in Cross-Examination

"Nothing weighs as much with the tribunal, whether Judge or Jury than the act of counsel who seeks not to accept the facts with qualifications, but who seeks to distort the facts in order that the fact may mean something less or more than it should mean." 11 Cr. L. J. 75.

Accuracy is the twin brother of honesty; in accuracy, of dishonesty. Accuracy of statement is one of the first element of truth, inaccuracy is near kin to falsehood.

"It must be understood that, in all this, your only purpose should be to ascertain the very truth, to trace an error if it exists, to try the memory of the witness if it be trustworthy. Never should you seek to entrap him into a falsehood, nor by your art to throw him into perplexity, with a design to discredit him, if you believe that not only is he honest, but that he has not erred. Your duty as an advocate is strictly limited by the rules of morality. It is no more permissible for you to tamper with the truth in others, or tempt them to confound or conceal it than to be false yourself. The art to be practised in cross-examination is to be used only when you really believe that the witness has not told the truth and it is your honest purpose to elicit it." See Cox's Advocate.

Cox says:—"There is a principle that should guide in the adoption or rejection of this expedient, for it is one upon which there exists somewhat too vague and indefinite an understanding, not merely in the profession, but with the general public, the former erring on the side of laxity, and the latter on that of strictness; the one being influenced by the feelings of an advocate, the other by the sympathies of a witness." Upon so important a matter it must surely be possible to ascertain some rules which may help to determine the limits of an advocate's duty in an endeavour to discredit a witness by cross-examination. Let us try to trace them. In this, as in all other questions of right or wrong it is necessary to go back beyond the point immediately at issue to consider the circumstances out of which it has arisen. In matters of duty and propriety it is most dangerous to introduce refined distinctions and to seek to justify by ingenious argument that which presents itself to the unbiassed and reflecting conscience as wrong. We may fairly doubt the correctness of any proceeding in a matter of morals which needs an argument for its justification. We cannot, therefore, assent to the conclusions which have been so elaborately wrought out by Lord Brougham and others, as to the duty of an advocate, conclusions opposed to the plainest dictates of morality, which forbid us to do an injury to our neighbours or to lie for any purpose whatever, and which are equally binding upon us, whether we are merely acting or speaking for another or upon our own account. We believe sincerely that the character and credit of the profession would be infinitely raised in public esteem if these broad landmarks of morality were more strictly observed in the practice of advocacy, and we are sure that in the long run it would be profitable to our clients. For, if, by arts injurious but wrong, by confusing the honest, browbeating the timid and putting false constructions upon the words of a witness, a verdict may be stolen now and then, the benefit of such triumphs is more than counterbalanced by the mistrust which a departure from candour and fairness, and a resort to arts for concealing or disguising the truth invariably sows in the mind of the Court and of the Jury, inclining them to look with suspicion upon everything the unscrupulous advocate says and does, and at length to see in him a trickster always, and to deny to him the credit of frankness and truth-telling, even when he is dealing honestly with them. Who that has addressed Juries many times can fail to have seen the incredulous smile

that curls upon their lips and the sort of stern resolve that settles upon their countenance, as if they would say: 'We are not going to be bamboozled by you.' It is not too much to say that owing to the reputation which some unscrupulous advocates have earned for the whole body of us, the *prima facie* impression of a Jury is almost invariably against the counsel who rises to address them, and that he has to disabuse their minds of this prejudice by impressing them with his own truthfulness, before he can obtain from them a fair consideration of his argument. But in justice to our order, it must be admitted that there is now far less cause for this mistrust than there used to be. Advocacy has, in this respect, vastly improved of late years and is still improving. Bullying and browbeating are as rare now as they were common formerly. It is seldom indeed that unscrupulous assertions and daring misrepresentations of evidence are indulged in. The standard of morality has been advanced among us, and is advancing, and it should be your solemn purpose and earnest endeavor not to suffer it to retrograde in your person, but by beginning with a stern resolve to maintain the loftiest principle of professional virtue, whatever the temptations to the contrary (and they will be many and formidable), to prove by your example that greatness and success as an advocate are not only compatible with the strictest integrity as a man, but that thenceforward these shall be the only paths to prosperity and honour. See Cox's Advocate.

## CHAPTER 20

### Do Not Make Personal References in Court

Sometimes counsels make personal references in Court and in their zeal often remind the Court that they have been practising at the Bar for 20 or 30 years and therefore they can put forward the law point with confidence. Sometimes they take their professional reputation as well. The counsel must avoid such personal references. Even if he is acquainted with the real facts of the case and has personal knowledge he should not import them in his address to the Court of Jury. The personal pronoun "I" might will be the coat arms of some individual but it ill befits the lawyer. When all is summed up, a man never speaks of himself without loss.

#### Illustrations

(i) The Judge decided that certain evidence was inadmissible. The attorney took strong exception to the ruling and insisted that it was admissible. "I know, your honour," said he warmly, "that it is proper evidence. Here I have been practising at the Bar for 40 years, and now I want to know if I am a fool?"

"That," quietly replied the Court, "is a question of fact, and not of law, so I won't pass any opinion upon it, but will let the Jury decide." 69 P.L.R. 1908, 18 M.L.J. 363.

(ii) "One day when Judge Gray was trying a case he was much annoyed by a man in the back of the room who kept moving about, shifting chairs and poking into corners. Finally the Judge stopped the hearing and said, "Young man, you are disturbing the Court by the noise you are making. What excuse have you to offer for your conduct?"

"Why, Judge," said the young man, "I've lost my overcoat." "That is no excuse," retorted the Judge. "People often lose whole suits in here without making half the disturbance." 28 M. L. J. p. 94.

(iii) On circuit at Jedburgh, a counsel rather given to grandiloquence, had emphasised a point by telling the Jury he pledged his professional reputation on it. At the next town he was loudly repeating the same pledge when Lord

Justice Clerk Inglis said orally, "I am afraid, Mr.—the article you mention is already in pawn at Jedburgh," 81 M. L. J. p. 108.

(iv) At a trial in an American Court one of the witnesses, an old lady of some eighty years, was closely questioned by the opposing counsel relative to the clearness of her eye-sight.

Q. "Can you see me," said he. A. "Yes."

Q. "How well can you see me?" A. "Well enough," "to see that you are neither a nergo, nor an Indian, nor a gentleman."

(v) A farmer, though severely cross-examined on the matter, remained very positive as to the identity of some ducks which he alleged had been stolen from him.

"How Can you be so certain?" asked the counsel for the prisoner. "I have some ducks of the same kind."

"Very likely," was the cool answer of the farmer; "those are not the only ducks I've had stolen."

In this case, it was not necessary nor proper for the counsel to make any personal reference to his having some ducks of the same kind. But that is no excuse for the witness's answer. Green Bag cited in P. L. R. (1908) Jour., p. 72.

A counsel who thought probably rightly, that he was not making much of an opposing witness, sat down with the remark, "Well, well, I see you're a clever fellow." It would certainly have been better if the lawyer had not made any such remark. It was not necessary at all. But the making of such a remark was no excuse for the witness replying, as he did.—"I should have liked, Sir, to return the compliment but you see I'm on my oath." See 1 Cr. L. J. 206.

## CHAPTER 21

### Do Not Get Elated on Partial Success in Cross-Examination

Some lawyers are over-confident of the result and after studying several points of law they think that the opposite side cannot meet their case. It often transpires that the opposite counsel takes such a lawyer by surprise on a point which his learned brother is not fully prepared. The best argument is that which comes in unawares. If a counsel scores a few points, let him not jump to the conclusion that his case is won.

It has been well said that the best argument often comes in unawares. "You need not ring a bell or blow a horn to announce it; let it reach the better judgment of the Jury at the right moment when feelings are warm and receptive." Tact in Court, p. 89.

"Do not expect that you are going to smash any witness and when I use the word 'smash' I use it in the ordinary colloquial term spoken of by the lawyers in conducting a vigorous cross-examination." 11 Cr. L. J. p. 78.

"A young man from the South," says a member of the New York Bar, "who some years ago, was so fortunate as to be enabled to enter the law offices of a well-known New York firm, was first entrusted with a very simple case. He was asked by the late James C. Carter then a member of the firm, to give an opinion in writing. When this opinion was submitted, it was observed that, with the touching confidence of the novice, the young man had begun with the expression 'I am clearly of opinion.'"

Mr. Carter smiled as his eyes caught this, and he said: "Son, never state that you are clearly of opinion on a law point. The most you can

hope to discover is the preponderance of the doubt." *Central Law Journal*, 29 M. L. J. p. 93.

On this subject, Cox says:—"At the very outset, let us warn you against exhibiting any kind of emotion during cross-examination especially to avoid the slightest show of exultation when the witness answers to your sagacious touch, and reveals what apparently he intended to conceal. It startles him to self-command, and closes the portal of his mind against you more closely than ever. You have put him upon his guard and defeated yourself. Let the most important answer appear to be received as calmly and unconsciously as if it were the most trivial of gossip. In the same manner you may carry him to the conclusion of his story, and what with an explanation of one fact, and addition to another and a toning down of the colour of the whole, the evidence will usually appear in a very different aspect after a judicious cross-examination, from that which it wore at the close of the examination-in-chief." Cox's Advocate.

A counsel must not under any circumstances show exultation on a favourable point. This rule can be well illustrated by the trial scene in Shakespeare's "Merchant of Venice." Shylock got elated when told that he could take a pound of flesh but when apprised that in doing so if he shed a drop of blood, he himself will be hanged, the colour of his countenance changed.

## CHAPTER 22

### Do Not be Over-Confident of the Result

It has been well said that the best argument often comes in unawares. "You need not ring a bell or blow a horn to announce it; let it reach the better judgment of the Jury at the right moment when feelings are warm and receptive." *Tact in Court*, p. 89.

"Do not expect that you are going to smash any witness and when I use the word "smash" I use it in the ordinary colloquial term spoken of by the lawyers in conducting a vigorous cross-examination." 11 Cr. L. J. p. 78.

"The man who goes into the Court with his brief, I care not how eminent a counsel he may be, I care not what his experience may be, I care not how good a case he may have, if he goes into the Court with the idea in his head that he is going to smash the witness by cross-examination, that man retires from the field defeated in nine cases out of ten, and perhaps in a larger percentage. Witnesses are knowing people, they are crafty, they know more about their affairs and what they are talking about than you do, or I do; they have lived with them, they are people who are quick of observation, and they have a certain amount of cunning, and that cunning the more careful counsel sometimes is unable to circumvent even when the Court and when the counsel are both convinced that the witness is not telling the truth." 11 Cr. L. J. 79.

You must always discount 25 per cent of the instructions given by your client.

While it is absolutely necessary that you have to prepare yourself thoroughly with all the facts and figures and the several points of law to meet all the issues that may arise in the case, it is equally necessary to bear in mind that you must not on any account be over confident of the result.

"As a rule, the lawyer who wishes to succeed in his client's case should always be thoroughly prepared, he should be ever on the alert for ambushes, masked batteries and rear attacks but he should never be over-confident." *Tact in Court*," p. 102.

## CHAPTER 23

**Omission to Cross-Examine on Certain Points**

Generally speaking, a party should put to each of his opponent's witnesses in turn, on so much of his own case as concerns that particular witness or in which he had a share. Thus, if a witness speaks about a conversation, the cross-examining lawyer must indicate by his examination how much of the witness's version of it he accepts and how much he disputes. If he asks no question he will be taken to accept the witness's account. *See* Phipson 6th Ed., p. 475 ; Powell, 9th Ed., p. 531 ; Odger's Pleadings 6th Ed., p. 304. In criminal trials, the accused must cross-examine regarding his own version of this transaction. If he pleads right of private defence, *alibi*, or or any other defence, he must put questions suggesting such defence. When defence does not cross-examine prosecution witnesses concerning defence version, it is usually safe to conclude that it is an after-thought and the defence evidence is concocted one. 1935 Rang. 398. As a rule, a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share. *e.g.*, if the witness has deposed to a conversation, the opposing counsel should indicate how much he accepts of such version, or suggest to the witness a different one. If he asks no questions, he will generally be taken to accept the witness's account. *See* Wigmore, S. 1371. "I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed to argue that he is a witness unworthy of credit. I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him ; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with the witnesses." *See* Taylor, S. 145. But if a party's counsel simply asks a witness in cross-examination whether an event took place, it cannot be said that that party commits itself to the assertion that such an event did actually take place. *See* 26 I. C. 547. Cross-examination need not be confined to the matters to which the witness has testified in his examination-in-chief, but extends to the whole case. Therefore, if a party calls a witness to prove the simplest fact connected with his case, the other party is at liberty not only to cross, examine him on every issue but also to put leading questions, to establish his own case. 42 C. 957.. Thus, an accused person is entitled in cross-examination to elicit facts in support of his defence from the prosecution witnesses, though the facts thus elicited have no relation to the facts to which the witnesses have testified in their examination-in-chief. *Ibid.* *See* illustration quoted in Ch. 9 *supra*.

## CHAPTER 24

**Lead the Witness to Absurd Position**

A witness who, either from self-importance, or from a desire to benefit the cause of the opposite party, or from any other reason, displays a loquacious propensity, should be encouraged to talk, in order that he may either fall

into some contradiction, or let drop something that may be serviceable to the party interrogating. "Of this damning kind are witnesses who prove too much; for instance, that a horse is the better for what the consent of mankind calls a blemish or a vice. The advocate on the other side never desires stronger evidence than that of a witness of this sort; he leads the witness on from one extravagant assertion in his friend's behalf to another; and instead of desiring him to mitigate, presses him to aggravate, his partiality; till at last he leaves him in the mire of some monstrous contradiction to the common sense and experience of the Court and jury; and this the advocate knows will deprive his whole testimony of credit in their minds." *See Best, S. 661.*

**Illustration.**—In the following cases, Mr. Wellman, the author of a well-known book on Cross-examination, was cross-examining a woman as to the speed of an electric car. He thought the witness was exaggerating the speed and in his cross-examination attempted the exaggeration to be carried to such a length as to make it appear an apparent absurdity.

Q. "And how fast, Miss—would you say the car was going?" A. "I really could not tell exactly, Mr. Wellman."

Q. "Would you say it was going at ten miles an hour?" A. "Oh fully that."

Q. "Twenty miles an hour?" A. "Yes, I should say it was going twenty miles an hour."

Q. "Will you say it was going thirty miles an hour?" inquired Wellman with a glance at the Jury. A. "Why, yes; I will say that it was."

Q. "Will you say it was going at forty?" A. "Yes."

Q. "Fifty?" A. "Yes I will say so."

Q. "Seventy?" A. "Yes."

Q. "Eighty?" A. "Yes, responded the young lady with a countenance absolutely devoid of expression.

Q. "A hundred?" inquired the lawyer with a thrill of eager triumph in his voice.

There was a significant hush in the Court-room. Then the witness, with a patient smile and a slight lifting of her pretty eyebrows, remarked quietly: "Mr. Wellman, don't you think we have carried our little joke enough?" The effect of all the previous statements was perfectly lost by this answer." *See Wellman.*

## CHAPTER 25

### Leading Questions

S. 141 Evidence Act defines leading question thus "Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question." Leading questions can be asked in cross-examination but not in examination-in-chief if objected to by the other party.

Section 142, Evidence Act, lays down that leading questions must not, if objected to by the adverse party, be asked in examination-in-chief or in a re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

If the question suggests the particular answer it is a leading question and, therefore, improper. 4 Beaven. 171.—173

There are two ways of questioning: one where the words made use of in the question suggest or prompt a particular answer, and which is called a

leading question, the other, where the question does not so lead, but is put in general terms, without at all pointing to a particular reply. This may be called an open question: it is open to any answer. "Did not you see this?" or "Did not you hear that?" are leading questions. Bl. Com. 449, 15th Ed. In them the person questioned is in a manner prompted to answer, he did see or hear this or that particular thing. "It is a good point of cunning for a man to shape the answer he would have in his own words and propositions; for it makes the other party stick the less." Bacon's Essays, Ed. Canning.

The following example of a leading question and answer occurs in Scott's *Rob Roy*:—"Ye will, therefore, (addressing Morris) please tell Mr. Justice Inglewood, whether we did not travel several miles together on the road, in consequence of your own anxious request and suggestion, reiterated once and again both on the evening that we were at North Allerton: and there declined by me, but afterwards accepted, when I overtook ye on the road near Clobberly Allers, and was prevailed on by you to resign my intentions of proceeding to Rothbury; and, for my misfortune, to a company you on your proposed route." "It is a melancholy truth," answered Morris, holding down his head, as he gaveth his general assent to the long and leading question, which Cambell put to him.

In a Chancery cause, where it was objected that the interrogatories were leading and to which objection the reply was, that the interrogatories were not leading as they did not suggest to the witness the answer to be given, Lord Landgale observed: "All interrogatories must, to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness, if he knew anything about something . . . It is impossible to examine a witness without referring to or suggesting the subject, upon which he is to answer. If the question suggests a particular answer, it is leading and improper. 4 Beaven. 171, 173. A question shall not be so propounded to a witness as to indicate the answer desired. 2 Maclean, 331.

A question is leading which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back as was here done or plainly suggests the answer which the party wishes to go from him. 40. N. H. 63. The proper signification of the expression 'a suggestive question' is one which suggests or puts the decided answer into the mouth of the witness. 38 Fla. 240 (241). The end proposed in extracting testimony is the obtaining of the actual recollection of the witness, not the allegations of another person, suggested to and adopted by the witness and falsely delivered as his. The real danger is that of collusion between the witness interrogated and the counsel interrogating, that the counsel will deliberately imply or suggest false facts with the expectation on his part and with an understanding on the part of the witness that he will assent to the truth of the false facts thus suggested. Evidence, 227. A question which in part assumes the truth of a controverted fact may lead a witness to reply without taking care to specify that his answer is based on that assumption, and may thus commit to an assertion of the assumed fact, though in fact he may not desire or be able to do so. This is obviously a danger to be prevented. Wigmore on Evidence, 864. A question is leading where the question assumes any fact which is in controversy, so that the answer may really or apparently admit that fact. Such are the frocked questions habitually put by some counsel if unchecked: as what was the plaintiff doing when the defendant struck him, the controversy being whether the defendant did strike. A dull or a forward witness may answer the first part of the question and neglect the last. 41 N. H. 616. A question admitting of being answered by a simple 'yes' or 'no' is regarded as generally a leading and improper one.



Nevertheless, it is obvious that such a question carries its suggestion more in the tone of voice than in the form of words. The particle 'not' (as in, "Did you not say that you refused the offer?") does indeed convey in itself the suggestion that an affirmative answer is desired; but the opposite form ("Did you say that you refused the offer?") by no means betray in form such a suggestion; in other words, it may or may not be leading. This is peculiarly a case for the principle that the trial Court's determination controls. The alternative form of question "State whether or not you said that you refused" "Did you or did you not refuse?" is free from this defect of form, because both affirmative and negative answers are presented for the witness's choice. Nevertheless, such a question may become leading, in so far as it rehearses lengthy details which the witness might not otherwise have mentioned and thus supplies him with full suggestions which he incorporates without any effort by the simple answer "I did" or "I did not." Accordingly the sound view is that such a question may or may not be improper, according to the amount of palpably suggestive detail which it embodies. Wigmore, 865.

It is sometimes laid down that leading questions are those which can be answered by more affirmative or negative, and in which, consequently, the the answer is fully suggested by the question. I think, however, that this description, and the objection founded upon it, are sometimes applied more extensively than the principle upon which they are founded requires; the good sense of the rule is perfectly manifest, with respect to all cases where the question propounded involves an answer immediately bearing upon the merits of the cause, and indicating to the witness a representation which will best accord with the interests of the party; but where the questions are merely introductory, where the mere answer yes or no, will leave the the point of the case precisely as it found it, and can only be material as laying the foundation for a further inquiry, the reason of the objection does not occur, and the objection itself appears to be ill-founded; and the making it can only proceed from a captious and petulant disposition to interrupt the course of examination. If a witness is asked generally with reference to a particular occasion, whether a person said anything, the answer yes or no, cannot very materially advance the interest of the party; and can only serve as the foundation for the more general question, of what it was that was said. But I have very frequently known this preliminary question excite a clamorous interposition for correcting the supposed impropriety, by telling the advocate that his question should be, What did the person say? A question which necessarily supposes the existence of the general fact of something having been said, which possibly may not be the fact. I think that, according to the principles of good sense and fair reasoning, the restriction ought not to be extended to cases to which the occasion of it cannot be deemed to apply, and that if the question does not prompt an answer bearing upon the subject in dispute, if the negative or affirmative answer will be perfectly indifferent, except as serving for a foundation of further inquiry, the Court would best consult the ends of justice, by discouraging a conduct that can have no other effect than a frivolous altercation, distracting the attention of the advocate on the one side, and giving the other an opportunity of showing off his talents for interruption, and exhibiting a pertness which may impress the bystanders with an idea of spirit and ingenuity. See Wrottesley pp. 29.

### Exceptions to General Rule Regarding Leading Questions

The following are *exceptions to the general rule*:— (i) *Introductory or undisputed matter.* The Court shall permit leading questions as to matters which are introductory or undisputed or which have been sufficiently proved (s. 142, second para.) The general rule does not apply to the part of the examination which is introductory to that which is material. If, indeed, it were not allowed to

approach the points in issue by such questions, examination would be most inconveniently protracted. To abridge the proceeding, and to bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that point and may recapitulate to him the acknowledged facts of the case, which have been already established. (Taylor, S. 1404). It is, therefore, not only permissible but proper to lead on matters introductory or undisputed. "But first observe that the rule against leading questions is properly applicable only to such questions as relate to the matter at issue. Whatever some priggish opponent may suggest, it is permitted to you—and the Judge will encourage you in the practice—to lead the witness directly up to the point in issue. It saves time and clears the case, and if you narrowly observe experienced advocates, you will find that they always adopt this course. For instance, instead of putting the introductory questions, 'Where do you live?' 'What are you?' and so forth, you should, unless there be some special reason to the contrary, directly put the leading questions, 'Are you a banker carrying on business in Lombard Street?' and so on, until you approach the questionable matter, when, of course, you will proceed to conduct the examination according to the strict rule." See Cox.

(ii) *Identification*. The attention of a witness may be directly pointed to some persons or things, for the purpose of identifying them. For instance, it is usual to ask a witness if the accused is the person whom he refers to. This form of question is obviously unsatisfactory, and the testimony does not carry much weight. "In the present day, it is considered the proper method for counsel merely to ask: Do you see the person in Court? and leave the witness to identify the prisoner (Powell, 9th., 528-529). It is advisable not to lead under such circumstances. Although it would be perfectly regular to point to the accused and ask a witness if that is the person to whom his evidence relates, yet if the witness can unassisted, single out the accused, his testimony will have more weight (Best, S. 643).

(iii) *Contradiction*. A witness may be asked leading questions in order to contradict statements made by another witness, e.g., if A has said that B told him so and so; B may be asked, Did you ever say that to A? Where one witness is called to contradict another as to expressions used by the latter, but which he denies having used, he may be asked directly,—Did the other witness use such expressions? The authorities are not quite agreed as to the reason of the exception, and strongly contend that the memory of the second witness ought first to be exhausted by his being asked what the other said on the occasion in question. (Best, S. 642). The witness may be asked not merely what was said, but whether the particular expressions were used, since otherwise a contradiction might never be arrived at (*Edmonds v. Walter*, 3 Stark 7; *Courteen v. Touse*, 1 Camp 43). Where, however, the conversation is not proved merely for the purpose of contradiction, the latter question is improper. (*Hallet v. Cousens*, 2 M. & R. 288—Phipson, p. 469.)

(iv) *Helping memory*. The rule will be relaxed where the inability of a witness to answer question put in the regular way obviously arises from defective memory (Best, S. 642). Thus, where a witness, has apparently forgotten a thing, and all attempts to recall to his mind by ordinary questions have failed, his attention may be drawn to it by a question in leading form. The object is to refresh his memory by drawing his attention to a particular topic without suggesting the answer. Where a witness stated that he was unable to remember the names of the members of a firm, but that he could recognise and identify them if they were read to him, Lord Ellenborough allowed it to be done. (*Acerro v. Petroni*, 1 Stark 100. The Court will, too, sometimes allow a pointed or leading question to be put to a witness of

tender years whose attention cannot otherwise be called to the matter under investigation. Taylor, S. 1405.

Cox says: "Frequently it will occur that you will have need to call the attention of the witness to something he may have forgotten—as thus: Suppose that you were examining as to some conversation. The witness has narrated the greater portion of it, but he has omitted a passage which is of importance to you. We know that, in fact, with all of us, in our calmest moments, it is difficult to repeat perfectly the whole of what was said at a certain interview, and if it had been a long one probably we might repeat it half-a-dozen times, and each time omit a different portion of it, although in either case the omitted part would be instantly recalled to our memories if we were asked, 'Did he not also say so-and-so?' or 'Was not something said about so-and-so?' But this sort of reminiscent question you are not permitted to put to a witness, because it would be a leading question, although he is far more likely, in his agitation, to forget that he had not repeated the whole than we should be in our calmest moments. In vain you ask him, 'Did anything more pass between you?' 'Was nothing more said?' 'Have you stated all that occurred?' He does not, in fact, remember precisely what he has stated of it, or the portion you desire to obtain has escaped his memory for the moment. It would flash upon him instantly if it were to be repeated, or even to be half uttered. But you may not help him so; and then there arises a perplexity which every advocate must often have experienced—in what manner can this be recalled without leading. As each case must depend upon its circumstances, it is impossible to lay down any rule to help you, or even to hint at forms of suggestion. But one method we may name, as having proved efficacious when others have failed, and that is, to make the witness repeat his account of the interview, or whatever it may be, then it will not unfrequently happen, as we have already observed, that he will remember and repeat the passage you require, and omit something else which he had previously stated. But this, of course, matters not; your object has been gained, and your adversary may take what advantage he can of the difference in the statements." Cox's Advocate.

(v) *Hostile Witness*. If a witness called by a party appears to be hostile or interested for the other party, the Court may in its discretion allow leading questions to be put *i. e.*, allow him to be cross-examined. S. 154, Evidence Act.

(vi) *Complicated Matter*. The rule will be relaxed, where inability of a witness to answer questions put in the regular way arises from the complicated nature of the matter as to which he is interrogated Best, S. 642.

The above six exceptions must not be taken as exhaustive. The Court has always a discretion in the matter, and it will allow leading questions to be put whenever it considers necessary in the interests of justice. Indeed, the Judge has, says Taylor, discretionary power, not controllable by the Court of appeal, of relaxing the general rule, whenever and under whatever circumstances, to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require. Taylor, S. 1405.

It is the Court, and not the counsel for the Crown, who can determine, whether leading questions should be permitted, and the responsibility of the permission rests with the Court, 37 Cal. 467.

As to the case law regarding questions see the following:

Leading questions can be asked if they are not objected to by the other party. 56 M. 7 : 133 M. 137 : 144 I.C. 629. The objection to leading questions is

not that they are absolutely illegal, but only that they are unfair. 7 A. 385—397. Even if the question is objected to, the Court may allow or disallow it and the Court of appeal or revision will not interfere in the discretion except in extreme cases. 42 C. 975. The proper way to exclude evidence obtained by leading questions is to disallow the question. 15 W.R. 23 Cr. If a Judge disallows a question, the Pleader should have the question and order disallowing it recorded, as such a refusal is illegal. 86 I. C. 468 : 17 Cr. L. J. 500, 55 I. C. 593 : 21 Cr. L. J. 321. The defence may cross-examine the prosecution witness for eliciting facts in their favour by asking leading questions. The Court may allow the prosecution to cross-examine them with regard to the matters elicited by the defence. 16 Cr. L. J. 497 : 19 C. W. N. 676. It is not open to the prosecution to put a leading question or question of the nature of cross-examination to their own witness without declaring him hostile. It is improper for the Court to allow such a question. The question and answer are both inadmissible. I. P. 758 : 1923 P. 62 : 71 I. C. 117 : 24 Cr. L. J. 69. Leading questions may be asked (1) with the permission of the Court, (2) from averse or hostile witness, (3) with regard to introductory or undisputed matter, (4) complicated matter, (5) for identification, contradiction or (6) when the memory of a witness is defective. *Evidence Act by Woodroffe and Ameer Ali*, (1921) Pages 913—915.

Leading questions may be asked with the permission of the Court, not for getting contradictions but for addition to something said by a witness, without getting him declared hostile. 1930 C. 139 : 31 Cr. L. J. 610 : 50 C. L. J. 467.

If the dying declaration appears to be the result of leading questions, it has no value. 1930 O. 60 : 31 Cr. L. J. 689 : 124 I. C. 444 : 6 O. W. N. 1956.

A party can put leading questions if not objected to but he cannot cross-examine his witness without permission of Court, even if no objection is taken. 56 M. 7.

Leading questions may be asked in cross-examination, provided firstly, that a counsel is not entitled to go to the length of putting the very words into the mouth of a witness which he is to echo back; secondly, a question which assumes facts as proved which have not been proved. *Taylor S. 1431*. See 42 C. 957.

### Illustration

Sometimes unnecessary objections are raised by defence counsels to questions put in examination in chief, merely because the answer to a question is yes or no will not make a leading question.

In the famous trial of Harry Dobkins held on 17th November 1942 before Mr. Justice Wrottesley for the murder of his wife, the sister of deceased was examined as prosecution witness. Her examination in chief by the prosecution counsel Mr. Byrne would have created an uproar in the Court room and the counsel would have been interrupted almost at every question. Here is the specimen of Mr. Byrne's examination in-chief :

Q. Is your name Polly Dubinski ? A. Yes.

Q. Do you live at No. 35 Walton Buildings, Boundary Estate, Shoreditch ?  
A. Correct.

Q. Did your sister Rachel marry the prisoner ? A. Yes.

Q. When did she marry him ? A. On the 5th September, 1920.

Q. Was the marriage a happy one ? A. No, sir.

Q. Did they separate after a time ? A. Yes.

Q. How long had they been married when they separated ? A. Six weeks.

Q. How old was your sister ? A. 48.

Mr. Justice Wrottesley : When ? A. When she left our home.

Q. When you last saw her ? A. Yes.

Mr. Byrne : Do you know when she was born, the date of her birth ? A. No, I am not quite certain of it.

Q. How tall was she ? A. I think about 5ft. 1 in.

Mr. Justice Wrottesley : You say about 5ft. 1 in ? A. Yes.

Mr. Byrne : What coloured hair had she at the time of her disappearance in April 1941 ? A. Dark brown, tinting grey at the temples.

Mr. Justice Wrottesley : Very dark brown, did you say ? A. Yes.

Q. Tinting grey ? A. Grey at the temples.

Q. You said " tinting grey at the temples." Is that what you said ? A. Tinting grey at the temples.

Mr. Byrne : Was she suffering from something which caused her to go to hospital ? A. Yes, she was under the hospital for a long while.

Q. What was it she was suffering from ? A. Something internally.

Q. Where did she live ? A. 44 Cookham Buildings.

Q. I am speaking now of 1941. A. 44 Cookham Buildings, Boundary Estate.

Q. Bethnal Green ; is that right ? A. Yes.

Q. Is that very far away from where you live ? A. No, just two blocks away, within five minutes.

Q. There was a child of the marriage, was there not ? A. Yes.

Q. It was a son, was it ? A. Yes.

Q. Did he live with her ? A. No.

Q. She lived alone, did she ? A. Yes.

Q. And you lived with your mother ? A. Yes.

Q. Used you to see your sister Rachel frequently ? A. Every day.

Q. Where ? A. At my home.

Q. Used she to spend any part of the day with you ? A. The best part of the day ; in fact, almost the whole of the day.

Q. Did she have meals with you ? A. Yes.

Q. Now will you look at Exhibit 2 and tell me whether that is a photograph of her ? A. Yes.

Q. Did she have some trouble with her teeth at one time ? A. Yes.

Q. Did she go to a dentist ? A. Yes.

Q. What was his name ? A. Mr. Kopkin, of Stoke Newington Road.

Q. Did you ever go with her to him ? A. Yes.

Q. When ? A. in 1934, when she had the first ones extracted. I gave the exact date, but I cannot recall it to mind.

Mr. Justice Wrottesley : You went with her to where—Mr. Kopkin's, of Stoke Newington Road ? A. Yes, Stoke Newington High Street.

Q. In 1934 ? A. Yes.

Q. When she first went ? A. Yes.

Mr. Byrne : I want to ask you about the 11th April. Do you recollect that day ? A. Yes.

Q. Was that Good Friday ? A. Yes.

Q. The 11th April, 1941 ? A. Yes.

Q. Did you see your sister that day ? A. Yes, between the hours of 1 and 2.

Q. Where ? A. In my lunch-time at our table at home, having lunch with us.

Q. With you and your mother. A. Yes.

Mr. Justice Wrottesley : At your home ? A. Yes.

Q. She had lunch with the rest of you ? A. With the rest of the family. We were all at home that day.

Mr. Byrne : Will you look at Exhibit 3 ? That is a handbag. (Same handed.) Do you recognize that bag ? A. Yes.

Q. Did you see it that day ? A. Yes.

Q. Had she got it with her ? A. Yes.

Q. It is a bag that you gave to your sister, a present from you ? A. Yes.

Q. You go to work, do you not ? A. Yes.

Q. At what time did you leave after lunch to go back to work ? A. Before 2 o'clock ; between half-past 1 and 2 o'clock.

Q. When you left, did you leave your sister in your house ? A. Yes.

Q. Did you ever see her again after that ? A. No.

Q. At what time did you get home that evening ? A. Between 5.30 and 6 o'clock.

Q. Did you remain at home all the evening ? A. I did.

Q. Your sister never came in ? A. No.

Q. The next morning, the 12th April, did you go to your sister's flat ?

Mr. Justice Wrottesley : Were you expecting her that evening ? A. Yes, she definitely said she would be back to supper.

Q. Oh, you were expecting her back ? A. Yes.

Q. She had said she was coming ? A. Yes.

Mr. Byrne : The next day, 12th April, you went to your sister's flat, did you ? A. Yes.

Q. Was that in the morning ? A. Yes.

Q. Had the bed been slept in ? A. No.

Q. And at 3 o'clock that afternoon, the 12th April, did you report the matter to the police ? A. That is correct.

## CHAPTER 26

### Interruption by Judge or Counsel

When the witness is in the hands of the cross-examiner, the Court should seldom interfere during the course of cross-examination. A Court should allow him to cross-examine the witness according as the counsel wishes to do. But the Court has got a duty to bring all evidence on record and to see that justice is done. 43 A. 283. Hence S. 165, Evidence Act, provides that the Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant ; and may order the production of any document or thing ; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question. But a witness cannot be questioned as to matters protected from disclosure in order that the Court can put questions to discredit a witness which if put by a party would not be allowed under S. 148 or 149, Evidence Act. See S. 165 (Proviso), Evidence Act.

The process of cross-examination being intricate, a counsel has to veil his questions by putting a number of questions on collateral matter in order to slip in an important question. A Court cannot compel the counsel to disclose questions which he desires to put in cross-examination. See 1931 S. 38 : 32 Cr. L. J. 666. The cross-examiner need not state beforehand the connection of a question which appears to be irrelevant, unless, exceptionally, under the trial Court's

determination. The chief reason is that the advantages of brevity and relevancy, which might otherwise be insisted on, are in experience found to be far overbalanced by the danger of destroying the effectiveness of the great weapon of cross-examination; for it would often be made useless by requiring in advance a betrayal of its purpose to the wary witness whose falsities are desired to be exposed. Wigmore, S. 1871.

It is true that unnecessary interruption on the part of the Judge is not justified but on the other hand an immobile and silent attitude of the judge is not desirable. Intelligent questions now and then on points that raise doubts in the judge's mind, enable the advocate to appreciate what is passing in his mind and furnish him with an opportunity to explain matters which if left unexplained are likely to cause harm. Sundara Aiyar says: "The complaint has of late been very frequent in England that judges often interrupt too much, that argument has practically become a course of interrogation by the judge or the advocate. At the same time, I believe that advocates generally would agree that nothing would be more unfortunate than that the judge should preserve complete silence, for it would not then be possible for a pleader to know whether his argument has been fully grasped or whether there are any difficulties that the judge feels in accepting it. It would be an advantage to him, if such difficulties are put to him by the Court so that he may have an opportunity of convincing the judge that the difficulties are not really insurmountable." (Professional Ethics, pp. 100, 101).

The benefits of cross-examination are sometimes defeated by the interposition of the Court, to require an explanation of the motive and object of the questions proposed, or to pronounce a judgment upon their immateriality; whereas experience frequently shows that it is only by an indirect, and apparently irrelevant, inquiry that a witness can be brought to divulge the truth which he prepared himself to conceal; the explanation of the motives and tendency of the question furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained if the gradual progress from immateriality to materiality was withheld from his observation. The importance of an inquiry may sometimes be strongly felt by an advocate, and upon very reasonable grounds, from his own instructions with respect to the bearing and circumstances of his cause, which the Judge, acting only upon the impressions of what has already been disclosed, cannot by any possibility anticipate. The full expositions of the motives can only be attained by a premature exposition of the case that is to be brought forward, and even when that can be done without prejudice to the party, the endeavour to satisfy the Court would have the common effect of an interruption in the regular cause of inquiry, and instead of assisting the accurate discussion of the question, would in all probability terminate in confused and desultory altercation.

**Controlling of Cross-examination:**—Sometimes the cross-examination assumes unnecessary and inordinate length. The Court has power to control the cross-examination in such a case. In *mofussil* practice, the cross-examinations are scarcely less remarkable for their length than the utter irrelevancy and futility of their character, Norton, 2nd Ed. S. 418. Though ordinarily the Court will not interfere with the discretion of counsel, while cross-examining a witness, 4 C. W. N. cxxi; 59 C. 1861: 139 I. C. 873, 1932 C. 667: 33 Cr. L. J. 854, it will do so when the privilege is being abused and the cross-examination is assuming inordinate length. 4 C. W. N. cxxi. Whereas the Court has full power to prevent in an appropriate manner any abuse of the right of cross-examination, 1922 O. 124, 1933 L. 667: 143 I. C. 479, 1933 L. 355, and to order it to be concluded within a reasonable time 30C. 625, 1924 P. 284: 72 I. C. 748, *See* Wigmore, S. 783, an arbitrary order, *e.g.*, that the cross-examination of

a witness should not exceed five minutes, is illegal, 42 I. C. 412 : 1921 C. 118. The Court should control the cross-examination and insist that the witness should understand the question put, before answer is obtained or recorded. Cross-examination tends to be abused and the words of the advocate are recorded as the words of witness when the witness has given affirmative or negative monosyllable. 1935 P. 263 : 14 p. 225. If the questions are misleading or improper, Court should control the cross-examination. In cross-examination the great art is to conceal from the witness the object with which the interrogator's questions are put, Best. S. 659, and this object is likely to be frustrated if the cross-examiner is required to explain the object with which the questions are put. The Judge may doubtless, in his discretion, when a question is asked on cross-examination which he thinks cannot be rendered pertinent, require an intimation of its object, and reject the evidence if not given. But this is a discretion which should be very sparingly exercised, and nothing further than a bare intimation should generally be required, for, in many cases, to state the precise object of a cross-examination would be to defeat it, 9 Mich. 381 cited in Wigmore, S. 1871.

**Examination by Judge :—**It is not in the province of Courts to examine witnesses. The Court should leave witnesses to pleaders to be dealt with as provided for under S. 138, Evidence Act. 1924 L. 371 : 25 Cr. L. J. 1226.

S. 165 Ev. Act empowers the Court to put any question at any stage and in any form for obtaining the truth. If the counsel, by his incompetency has not been able to bring relevant facts on the record the judge must make up for that in competency and examine the witness on salient points, 10 W.R. 280 (282). Although a Judge could not be acting strictly according to the rules of judicial practice if he were to take the work of examining and cross-examining witness in his own hand, yet it is his duty and privilege to put questions to witnesses in order to get at the truth. 1936 L. 887. Peacock C. J. remarked that witnesses are in many cases either cross-examined too much on irrelevant matters or too little. It is not in frequent to find unskilful handling of cases. the difficulty is enhanced by the fact that cases are seldom prepared for trial before they come to Court. 68 I.C. 812. Murker ji J. strongly condemned the conduct of defence counsel in not cross-examining fully the witnesses in a murder case. 28 C.W.N. 170. In such cases judge should cross-examine. 1942 p. 90.

**Altercation between Judge and Counsel :** Often it happens that an altercation between Judge and counsel ensues when the latter wants to put a question and he is interrupted by the Judge. Generally, a counsel has the best interest of his clients in his heart and wants to bring out certain facts that are remotely connected with the matter in issue. The Judge thinks that the relevancy of such matter is doubtful and disallows certain questions. This leads to unpleasantness between the Judge and the counsel. The sound rule is that some latitude should be allowed to the members of the Bar, insisting in the conduct of his case upon his question being taken down or his objection noted where the Court thinks the question inadmissible or the questions untenable. There ought to be a spirit of give and take between the Bench and the Bar in such a matter and every little persistence on the part of the pleader should not be turned into the occasion of the criminal trial unless the pleader's conduct is so vexatious as to lead to the inference that his intention is to insult or interrupt the Court. 6 Bom. L. Rep. 541.

The counsel is an officer of the Court and has got duty to perform according to the best interests of his clients. Therefore, his over-zealousness in the cause should not be misinterpreted. The counsel should also bear in mind Paul Brown's golden rule "Be respectful to the Court and to the Jury, kind to your colleagues, civil to your antagonist, but never sacrifice the slightest principle of duty to an



overweening deference towards either," and that the counsel should always remember that cross-examination is a duty we owe to our clients and not a matter of mere personal glory or fame. 20 M. L. J. 371.

A lawyer should always preserve his own self-respect even under trying circumstances, perfect self-command will give him incalculable advantage over an impudent adversary. 14 Cr. L. J. 18.

**Do not Interfere with the Judge if he Takes up Cross-examination for you**  
 "Never continue the cross-examination of a witness if you see the Judge showed the slightest disposition to do it himself. If you see the Judge, to use a somewhat sporting expression, in the least inclined to take up the running, let him do it. He would do it much better, much more effectively than counsel could do it, because there is not one of Her Majesty's Judges sitting on the Bench who, if he chose, could not mar the best cross-examination that could be administered. A witness cannot be cross-examined without the approval of the Bench; with the approval of the Bench one can do pretty much what one liked. Wrottesley on Examination of Witnesses, p. 91. Sir James Scarlett used to allow the Jurors and even the Judges to discover for themselves the best parts of his case. It flattered their vanity. Scarlett went upon the theory, he tells us in the fragments of his autobiography which were completed before his death, that whatever strikes the mind of a Juror as the result of his own observation and discovery makes always the strongest impression upon him, and the Juror holds on to his own discovery with great tenacity and often possibly to the exclusion of every other fact in the case. Wellmen, p. 157.

**Interruption by Counsel.** In Muffasil Courts the counsels are generally in the habit of interrupting their opposing counsel during the course of cross-examination or arguments. This is considered to be an achievement of advocacy. Their clients are also heard to say: "My vakil did not allow his opponent to speak a word. He simply gagged his mouth." Both the client and the counsel take a particular pride in such a dishonourable course. A number of ugly scenes are created, when such a counsel catches a tartar. More often challenge regarding physical strength is held out. Is it a part of the duty of counsel to behave so shabbily and bring into contempt the honourable profession to which he belongs? He sometimes thinks that he is paid for insulting the opposing counsel and not to allow him to have his say, by constant interruption.

"When you have a bad case abuse your opponent" is a trite saying. An advocate should not fall foul of his colleague at the Bar. His opponent should be treated with fairness, courtesy and consideration. He is performing the same duties as you are and has the same privileges and rights which you enjoy. It does not unoften happen that a lawyer rises to his feet and interrupts his opponent every now and then during the cross-examination or address. Such interruption is justifiable only when the opponent is misinterpreting the statements of a witness, or misleading the Court or witness, or putting a wrong interpretation to a document or doing some such thing. But unless the objection be substantial and require immediate attention, no interruption of any kind should be allowed. Such interruption may do incalculable injury to an advocate by making him lose the thread of his argument or spoiling the effect of cross-examination upon a vital point. The altercation that inevitably follows drives away from his memory, points he had thought out and unsettles his whole scheme. The witness who had almost succumbed or was on the point of making an important statement takes his hint from the interruption and gets time to collect himself and to frame his answers accordingly. A lawyer who

interposes at such a moment with the object of diverting the channel of cross-examination and conveying a hint to the witness is certainly guilty of dishonourable conduct. Another reprehensible tactics is to jump up and stop the witness when he is on the point of giving an inconvenient answer by exclaiming that he has already said so and so, though he has hardly said anything of the kind. The witness takes his cue from the interruption and repeats the answer suggested, to his great relief or takes the hint that he ought not to give a straight reply. If he has already given a reply and the question is redundant, the Court is there to check superfluous questions. No rebuke is strong enough for such interruption. It must always be sternly repressed. *See Sarkar's Modern Advocacy*, pp. 135-136. "The interruption may itself be founded upon a misunderstanding which has to be corrected, and an argument ensues which breaks off the examination at a critical point in the train of reasoning. It may be of no avail that the interruption is corrected and rebutted. The mischief has been done and it may be impossible to undo it. Any member of the Bar who did it intentionally with the object of creating a diversion, and of assisting the witness, would be guilty of grave misconduct. It is not only during the reply that interruption should be eschewed. It is objectionable at all times and the rule against it must always be observed. It is at the best bad policy. Interruption leads to altercation, and produces illfeeling and a kind of disorder. It recoils on the head of its author. It gives the impression that he has a bad case, and is painfully conscious of his weak points, and cannot trust the Court to give due weight to his own arguments presented in their due course, but must needs be constantly endeavouring to drive them home. It is moreover, embarrassing and unfair to the opponent, who by being constantly diverted from his main theme may be unduly harassed, and fail to do justice to his case. Nothing is more calculated to give an advocate a bad name, and to create an unfavourable impression about his methods upon the tribunal before whom he appears than a persistent practice of needless interruptions. The same may be said of objections for the sake of raising difficulties. Misconceived objections to evidence and obviously unsound legal points create the worst possible impression, and if constantly repeated may result in spoiling a perfectly good case." *Walsh's Advocate*, p. 151.

On the subject of interruption, Sundara Aiyar says; "You may perhaps find that the judge is being influenced by a particular course of argument, and you may feel that your client's case is slipping from under your feet. Remember it is a duty that you owe to your opponent so long as the argument itself is fair, to allow the opponent to produce whatever impression he can, and true advocacy consists in being able to remove that impression if possible when your turn comes. You should act on the principle. "Do unto others as you would be done by." This should always be borne in mind that there should be no improper interruption. Some judges may welcome interruption in order that their own work may be shortened, but it will be the duty of an advocate to discourage such a disposition on the part of a judge, for, unless he does that, the result would be constant wrangling between the advocates and the confusion in Court. I would say that if really you decide to interrupt, it is much better that you should do so in a formal, dignified manner, than to make it actually impossible for the other side to go on by muttered interruptions. You have no right to prevent the judge from following the course of the argument on the opposite side. If you think that the argument is not proper, or that there is matter which you are entitled to introduce at a particular stage of the argument, the proper course is formally to stand up and say that you wish to interrupt, and then state what you have to say. I may tell you that improperly interrupting and abusing

the opposite side, or treating the pleader on the opposite side with contempt, or insulting him are all contempts of Court. Professional Ethics, pp 107-108.

### Illustrations

(i) In the famous Tower of Silence case Bombay, there had been two or three altercations between the judge and the counsel, when there were some interruptions. Mr. Anstey was in charge of defence while Mr. Ferguson represented the Crown. A portion of cross-examination by Mr. Anstey is set forth below :

Q. Have you, or have you not, enquired since yestrday whether Mr. Sounter, or any of the friends of Mr. Sounter, has made an application to Cooverjee Pragjee and Jacob Jumal to become the purchaser or the lessee of a portion of this very land ? A. I have made no enquiries.

Q. Has nobody told you anything about it ? A. No, ncither one way nor the other.

Q. Now, Sir, again I may be mistaken but did you not use the words "chunam pounder" ? A. No, I think not.

Mr. Anstey :— Then it was Mr. Ferguson.

Mr. Ferguson :—I have not given evidence in the case.

Mr. Anstey :—My learned friend says he has not given evidence in the case He has. He made statements of what this man was going to say which he has not confirmed. Therefore it must be my learned friend's own evidence.

Mr. Ferguson :—I flatly contradict that statement.

Mr. Anstey :—It is perfectly true.

Mr. Ferguson :—It is perfectly untrue, and my friend dare not say that out of Court. (Sensation).

Mr. Anstey :—My Lord, is this an appeal to my personal courage.

The Judge :—Mr. Anstey, will you examine the witness ?

Mr. Anstey :—I am told I dare not say this out of Court. It is becoming a favourite phrase of certain members of the Bar.

The Judge :—I have not heard it before in this case.

Mr. Anstey :—I have not, but it has been said in another case. It seems to be a Crown phrase. If your Lordship does not protect me from observations of this kind, I must protect myself.

The Judge :—Very well, Mr. Anstey. But I do not think it is necessary to interrupt the course of the proceedings.

Mr. Anstey :—It is interrupted already.

The Judge :—It is you who brought it on.

Mr. Anstey :—I beg Your Lordship's pardon.

The Judge :—It was you who brought it on, I repeat.

Mr. Anstey :—I say again that the first interruption came from Mr. Ferguson.

The Judge :—Will you examine the witness or not ?

Mr. Anstey :—I shall. But it is not correct to say I brought it on myself. The interruption came from Mr. Ferguson.

The Judge :—I again repeat the statement—you brought it on yourself.

Mr. Anstey :—I say again the first interruption came from Mr. Ferguson who said....

The Judge :—Will you examine the witness, Mr. Anstey ? If you insist on interrupting the proceedings, I shall have to fine you.

Mr. Anstey :—If you fine me I shall take the opinion of another Court, that is all.

The Judge :—Very well.

This ended the matter and cross-examination continued.

*Mr. Anstey* :—Did you not say to Mr. Jafferson at the Police Court “It was arranged that, on the day they went to take possession, the police should be on the ground to prevent a breach of the peace?”

*Witness* :—Yes, I said so.

*The Judge* :—I don’t think it differs materially from the answers he has given you.

*Mr. Anstey* :—My. Lord, I must object to my cross-examination being interrupted in this manner.

*The Judge* :—I merely made an observation.

*Mr. Anstey* :—I can understand a Court interposing on behalf of a prisoner but not in this way.

*The Judge* :—I interposed on behalf of the witness, whose evidence you were reading.

*Mr. Anstey* :—Well, My Lord, I again object to having my cross-examination interrupted in this way—no Court has a right to do so.

*The Judge* :—I shall interpose in any way I think fit, Mr. Anstey.

*Mr. Anstey* :—Then, My Lord, it shall go further than this, that is all. Justice shall be done to the prisoners, and a conviction shall not be obtained if I can help it. I repeat my objection to these interruptions, and ask Your Lordship to take a note of it.

## CHAPTER 27

### Boldness and Courage of Counsel

An advocate can only be bold and courageous if he has thorough knowledge of law and full command over the facts. Fear always springs from ignorance. Of all the fears in the world, the greatest fear is the fear of the self. This courage is not the courage of the prize fighter nor of the bully, but is the courage that will tackle every problem or question presented, investigate it, find out the whys and the wherefores, the ins and outs, the pleasing features as well as those that are disagreeable, and then stand by your guns. Cowardice is usually the result of ignorance. The lawyer who is armed with the facts with all their bearings, and who is capable of applying the law to the satisfaction of his judgment, is thrice armed and armed with a weapon that his adversary will fear. 16 M.L.J. 355.

“Without failing in respect to the Bench it is the duty of the member of the Bar to assert their just rights to be heard by the tribunal before which they are practising. They should be fearless and independent in the discharge of their duties; they would be perfectly right in protesting against irregular procedure on the part of any judge, and if the advocate is improperly checked or found fault with—that is, not if any observations are made on the merits of the case, but if the advocate is improperly dealt with—he should vindicate the independence of the Bar. He would be perfectly justified in insisting on getting a proper hearing, and he would have the right to object to any interruption with the course of his argument such as to disturb him in doing his duty to his client. But every advocate should remember that, after all, his object is to convince the Court, and it would be quite right and expedient on his part, as indeed it is his duty, to listen to any expression of opinion by the Bench and to answer any question that the Bench might put in order that he might be able to make the Judges understand his exact position.” *Professional Ethics*, pp. 99, 100.

“The fearlessness, honesty and earnestness of an advocate are bound to elicit the admiration of a Judge and to earn his confidence in no time. A lawyer who

loses the confidence of the Judge, will lose the confidence of the client. Flattery and subserviency are never appreciated by a Judge, whatever his eccentricities or foibles might be. Reference has already been made to the independence of the Bar. The independence of the Bar is a matter of anxiety to all persons interested in the welfare of the State. If the liberty of the subject is threatened or interfered with, it is an independent Bar that will champion the cause fearlessly and secure justice. From this point of view, the independence of the Bench is equally important. The Bench must be entirely free from the influence of the Executive or outside persons, in order that it may enjoy the fullest confidence of the public. The independence of the Bar is in no way antagonistic to the independence of the Bench and the two may well thrive together. But in this eagerness to press his client's case the advocate should never step over the well-defined limits. Independence in the legal profession does not mean liberty to do and say anything a man pleases. It is the liberty to do his duty to the client without fear or favour. There is restraint everywhere in our life, and life would not be worth living if every one had unrestrained liberty. A calm unruffled temper and politeness to all is an absolute safeguard against scenes in Court. Insolence or impertinence should not be mistaken for independence. Some junior members of the profession are apt to think that if they have made a sharp or rude retort to the Judge, they have shown enough independence. They will soon realise that such tactics do not pay or win approbation. Lawyers have a duty not only towards the client but also towards the client but also towards the Court and they are to co-operate with the Court in the orderly and pure administration of justice. It is a serious thing to offer an imputation against the impartiality of the trying Court or to make offensive remarks when a ruling is given against the advocate's contention. He has every right to make his submissions and to protest firmly but politely, but judicial rulings must be accepted without murmur." See Sarkar's *Modern Advocacy*, pp. 120—121.

In a case the counsel remarked that trials before "Deputy Magistrate were a farce and a camouflage" and on the Magistrate's protesting against such an unwarrantable and unjust observation of counsel, the latter said that he would not listen to the magistrate. Upon that the Magistrate said that counsel, if he liked, might leave the Court. C. C. Ghose J., said that "it was a matter of profound surprise and abiding regret that any counsel should be found to betray himself in language such as that complained of by the trying Magistrate." (*Surendra M. Maitra and other v. R.*, *Statesman*, 15th August 1928, Ghose and Jack, JJ.)

In a case reported in 27 C.W.N. 88, a senior member of the Bar made an imputation against the fairness and impartiality of the Court and his conduct was sought to be justified by the specious plea of independence of the Bar. He was suspended for a month. Richardson, J., observed:—"I wish that gentleman belonging to the learned profession of the law would get it out of their heads that any one desires to curtail the privileges of the Bar or interfere with its independence. I take it that independence in this connection means freedom to do one's individual duty without fear or favour of any man. The independence of the Bar is recognised as a valuable asset in the civic life of the community and is, as I regard the matter, a corollary of that independence which appertains in the same sense to the Bench. I know of no quarter from which the independence of the Bar in that sense is in any way menaced unless there be a hint of danger arising from Associations formed by the members of the Bar themselves. There may be a tendency on the part of such Associations unduly to restrict the liberty of individuals in matters not strictly pertaining to professional practice. But if there be such a danger, or such a tendency, the members of the profession have the remedy in their own hands. Incidents will, of course, occur from time

to time which had better not occurred. After all men are human, whether on the Bench or at the Bar, and in the heat of the moment, expressions may be used on one side or the other which are not within the bounds of propriety, but in the great majority of such cases an apology or an expression of regret for over-hastiness in speech, tendered and accepted in the right spirit, would be sufficient to terminate the incident. Relations between the Bench and the Bar can be adjusted only on a basis of mutual respect and mutual anxiety that justice should be duly administered." In the same case Sanderson, C. J., said: "I yield to none in my desire to see the independence of the Bar maintained.....the independence of the Bar has been in the past, and I hope will be, in the future maintained without making gratuitous and unfounded imputations upon the fairness and impartiality of the tribunal. Work in Court demands the exercise of self-control and forbearance at every step. It is quite a different atmosphere and liberties or effusions of temper which one is accustomed to find outside must be restrained. This is also a part of the training for the profession. The orderly and dignified manner in which business is conducted in the higher Courts of justice are seldom found in other Courts. The higher a man rises in the profession the greater is the conception of responsibility. Duties should be performed with firmness but without display of temper. A quick tempered advocate is sure to land himself into trouble soon. Petulance or excessive argumentativeness will mark a lawyer out as a cantankerous advocate. Overweening conceit or assumption of the airs of a High Court Judge in whatever he says, makes an advocate the object of derision. The advocate must acquire the habit of keeping a cool temper howsoever strong or multifarious the provocation for might be. Under no circumstances should he lose self-control and presence of mind. His composure must be maintained under all circumstances." See Sarkar's *Modern Advocacy*, p. 124.

The Lord Chancellor of England said in one of his famous speeches:—"We live in times when it is no longer necessary to defend the liberties of the subject from the interference of the Crown. Those days were over, and over probably for ever, but the Bar still requires courage and assiduity and the spirit which animated men like Coke, Somers and Erskine, who in different times and places and different emergencies, stood up fearlessly to protect those who were in distress. The Judges to-day are certainly neither timid nor subservient. They stand with great effect between the subject and the Executive. But if the Bar has not got the old problems to face, the Bar still requires those qualities of character and above all, of courage which has always been its distinctive characteristic." See 27 M. L. J. 87.

### Illustrations

(i) Lord Ellenborough once presided at a trial of the publishers of a newspaper for a libel. Mr. Brougham being their counsel, made a fervid address on their behalf. The Judge in summing up remarked that the defendant's counsel had imbibed the noxious spirit of his client, and had inoculated himself with all the poison and virus of the libel. Mr. Brougham when his client was brought up for judgment, thus complained of these animadversions. "My Lord, why am I thus identified with the interests of my client? I appear here as an English advocate, with the privileges and responsibilities of that office, and no man shall call in question my principles in the faithful and honest discharge of my duty. It is not assuredly to those only who clamour out their faith from high places, that credit will be given for the sincerity of their professions." The Judge discreetly remained silent. See 16 M. L. J. 420.

(ii) "Erskine in his defence of Captain Baille for libel when he was reminded by the venerable Lord Mansfield that the great Lord Sandwicke, who had been

instrumental in having the criminal information filed against his client, but who himself kept in the background, was not in Court, the bold young advocate burst forth impetuously:—"I know that he is not formally before the Court, but for that very reason, I will bring him before the Court. He has placed these men in the front of the battle, in hope to escape under their shelter, but I will not join in battle with them, their vices, though screwed up to the highest pitch of depravity, are not of dignity enough to vindicate the combat with me. I will drag him to light who is the darker mover behind this scene of inequity. I assert that Lord Sandwiche has but one road to escape out of this business without pollution and disgrace—and that is, by publicly disavowing the acts of the prosecution and restoring Captain Baille to his command. If, on the contrary, he continues to protect the prosecutors in spite of the evidence of their guilt, which has excited the abhorrence of the numerous audience who crowd this Court, if he keeps this injured man suspended or dares to turn that suspension into a removal, I shall then not scruple to declare him an accomplice in their guilt, a shameless oppressor, a disgrace to his rank, and a traitor to his trust. See *Hardwick*—41.

Erskine showed great courage, also, in his controversy with Justice Buller in the case of the *King v. Dean of St. Asaph*, for libel. In that case Justice Buller instructed the Jury, "that there was no doubt as to the innuendoes, and that the principal question was, whether or not the defendant published the pamphlet, and if he did you ought to convict him." The Jury returned the verdict, "guilty of publishing only" Buller then said, "if you find guilty of publishing, you must not use the word 'only'."

Erskine.—"I beg your lordships pardon, I mean nothing that is irregular. I understand they say, "We only find him guilty of publishing." Juror.—"Certainly, that is all we do find."

Buller.—"If you only attend to what is said there is no difficulty or doubt."

Erskine.—"Gentlemen, I desire to know whether you mean the word 'only' to stand in your verdict." Juror.—"Certainly."

Buller.—"Gentlemen, if you add the word 'only' it will negative the innuendoes."

Erskine.—"I desire your Lordship, sitting here as Judge, to record the verdict given by the Jury."

Buller.—"You say he is guilty of publishing, and the meaning of the innuendoes is as stated in the indictment." Juror.—"Certainly."

Erskine.—"Is the word 'only' to stand as a part of your verdict?"

Jury.—"Certainly."

Erskine.—"Then I insist that it shall be recorded."

Buller.—"The verdict must not be misunderstood—let me understand the Jury."

Erskine.—"The Jury understand the verdict."

Buller.—"Sir, I will not be interrupted."

Erskine.—"I stand here as an advocate for a brother citizen and I desire the word 'only' may be recorded."

Buller.—"Sit down, Sir. Remember your duty, or I shall be obliged to proceed in another manner."

Erskine.—"Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours, and I shall not alter my conduct."

The verdict was recorded as Erskine desired, and his client was acquitted. See *Hardwick* 48.

In the case of *Commonwealth v. Farkin*, tried in the Court of Oyer and Terminer of Philadelphia, 1848, David Paul Brown was counsel for the prisoner.

The trial was a long and tedious and bitterly contested one. At the close of the address of the Commonwealth's Attorney the Judge proceeded to charge the Jury at two o'clock in the morning.

Mr. Brown.—“I object to your Honour's charging this Jury, unless your colleague is on the Bench.”

Attorney-General.—“Can we not consent to the charge in his absence? It is a very reasonable law, and his Honour's associate Judge has gone home.”

Mr. Brown.—“I consent to nothing in a capital case, it is as much his Honour's duty to be here as mine, and I shall take the advantage of his absence. As to the unseasonable hour, that is not my fault, no hour is seasonable for the violation of law.” *See Hardwick 44.*

In the work entitled “Lord Erskine and of his Contemporaries,” the author says:—“The professional life of this eminent person, who has of late years reached the highest honours of the law, is in every respect useful as an example to future lawyers. It shows that a base time-serving demeanour towards the Judges, and a corrupt or servile conduct towards the Government, are not the only, though from the frailty of human nature and wickedness of the age, they may often prove the surest roads to perferment. It exalts the character of the English barrister beyond what in former times it had attained and holds out an illustrious instance of patriotism and independence, united with the highest legal excellence, and crowned in the worst of times with the most ample success. But it is doubly important, by proving how much a single man can do against the corruptions of his age, and how far he can vindicate the liberties of his country, so long as Courts of Justice are pure, by raising his single voice against the outcry of the people and the influence of the Crown, at a time when the union of these opposite forces was bearing down all opposition in Parliament, and daily setting at naught the most splendid talents, armed with the most just cause.”

“Never be bluffed out of Court, but do not begin the bluff,” says Judge Donovan, in his work entitled “Tact in Court,” p. 113. Once in Court, stay in, and be an opponent, as Shakespeare well describes through Polonius: “Beware of entrance to a quarrel, but being in, bear it that the opposer may beware of thee.” *Ibid.* “Some men will fight all the better by being thrown down a pair of stairs; some take to the woods at the first sight of the battle. Clients, suitors, juries, and spectators like a man who can stand in an emergency. A sudden turn in a suit—a new point sprung upon point the trial—an enemy from the flank, should draw out the resources of an advocate; and happy the man who is equal to such occasions. If equal, he is marked and remembered long afterwards; but to secure this victory one should be very guarded not to begin the assault, for the vanquished assaulter is always a doubly defeated and humiliated. Great lawyers seldom stood to petty advantages. *See Tact in Court*, p. 114.

“Sir Frederick Thesiger was a very pleasing speaker and popular advocate, but he was timid, and had a great dislike to losing a case, and consequently always wanted to get rid of a case unless he saw his way to get the verdict. I delivered a brief to him and other counsel in an action brought by a well-known firm of stock-brokers against a young man residing with his father, who was a very wealthy man living in London. The defendant was the nephew of a public man. The plaintiff sought to recover about £30,000 in respect of Stock Exchange transactions. The young man had no money whatever beyond an allowance from his father. The father had on a previous occasion paid the same brokers upwards of £20,000 for losses of his son, and in doing so had emphatical-



ly stated that if such transactions were continued he would not pay another shilling. However within a short period the brokers made a claim of about £ 30,000 and commenced an action against the son for the recovery of the amount. The father instructed me to defend the action regardless of expense in order to expose the conduct of the brokers in allowing such a young man to gamble in the expectation that the father would pay losses. Under an order obtained for the purpose, I personally inspected the plaintiff's books, but was unable to investigate them fully. It seemed to me, however, that they were not in accordance with the claim, and I instructed Mr. Quilter, a well-known accountant, to investigate the accounts, and after a time he reported that the claim was fraudulent. The action proceeded and I delivered briefs to Sir Frederick Thesiger and two other eminent counsel and the evening before the day on which the case was expected to come on, I had a consultation with counsel. Sir Frederick Thesiger, who had not fully read his brief, said that it was a case which must be referred to arbitration, and that it would be impossible to go fully into the accounts in Court before the Jury. I said that a reference to arbitration would doubtless be the ruin of the young man inasmuch as might well be that although many of the transactions were fraudulent some of the items of claim might be enforceable, and that even if the reference only resulted in a small sum being established the father would pay nothing, whereas I did not believe the plaintiffs would face a public trial. Sir Frederick Thesiger still pressed for a reference; but on the following morning he told me he thought my view was quite right. He must have passed a greater part of the night in reading the papers, for I found he had in his own neat handwriting written many sheets of notes of the case. The case was not reached on the day anticipated, but four eminent counsel instructed on behalf of the plaintiffs were in attendance in Court the whole of the day, and the three counsel who were to appear at the trial for the defendant were also sitting in Court expecting the case to come on, but it was not reached. On the next day it stood early in the list, and the same counsel were in Court as on the previous day. I happened to be engaged in a case which was on in the adjoining Court of Common Pleas. After a time my clerk came to me to say that the case to which I have referred was called on, and I at once went over to the Court and found to my surprise that the four counsel for the plaintiffs had disappeared, and that the action was withdrawn. Thus it was evident that the plaintiffs had merely been bluffing; they thought that the defendant's father would not allow the son's speculations to be exposed, but they dared not face an exposure of their own transactions which would probably have resulted in their being expelled from the stock exchange." *Hollam's Jottings of an Old Solicitor.*

Be forcible, firm, dignified and clear. A Jury will not be long in reading between the lines if counsel lacks force and earnestness of manner and an interest in his client. For days and months both parties to the suit may have carried their legal trouble at home and at work like a leaden load, dreamed of it nights, and pondered over it hours together, until their heads would ache with anxiety. To such, a tame or wavering presentation of their side of a suit is more than human nature can endure, and is sure to lose a client, if not the case on trial. *Tact in Court, 112.* A firm and dignified bearing will be impressive alike to Court and Jury, and add respect for your argument that never comes of "shilly-shally" and frivolous statements. The business of law-suits is to adjust differences, protect the helpless, enforce rights and punish wrong-doers—it is a serious business. But, above all, says an old attorney, be clear. Many Jurors are ignorant of big words; they do not comprehend the real issue to be decided; some understand English imperfectly, others reason in a slow roundabout way and reach conclusions after a long study and much meditation. Witnesses may

be confused by a lack of clearness. It is a good plan to see some experienced Jurymen, early after a trial, for a few trials at least, and say, 'How was the case presented?' In nine out of ten cases he will say, "You ought to have made this or that point a little plainer. The Jury did not understand it fully." *Ibid.*

### Illustrations

(i) Mr. Curran, the Irish counsel once offended Justice Robinson. "Sir," exclaimed the Judge, in a furious tone, "you are forgetting the respect that you owe to the dignity of the judicial character."

"Dignity! My Lord," retorted Curran, "upon that point I shall cite you a case from a book of some authority with which you are perhaps not acquainted. A poor Scotchman, upon his arrival in London, thinking himself insulted by a stranger and imagining that he was the stronger man, resolved to resent the affront, and taking off his coat, delivered it to a bystander to hold; but having lost the battle, he turned to resume his garment, when he discovered that he had unfortunately lost that also—that the trustee of his habiliments had decamped during the affray. So, my Lord, when the person who is invested with the dignity of the judgment-seat, lays it aside for a moment, to enter into a disgraceful personal contest, it is in vain, when he has been worsted in the encounter, that he seeks to resume it—it is in vain that he endeavours to shelter himself behind an authority which he has abandoned."

The Judge cried out: "If you say another word, Sir, I will convict you."

"Then, my Lord, it will be the best thing you will have committed this year."

The Judge did not keep his threat; he applied, however, to his brethren to unfrock the daring advocate, but they refused to interfere, and so the matter ended.

(ii) In the Court of the Common Pleas, on the trial *Thirtell v. Beams*, Mr. Sergeant Taddy examined a witness and asked him a question respecting some event that had happened since the plaintiff had disappeared from that neighbourhood.

Mr. Justice Parke immediately observed:—"That is a very improper question and ought not to have been asked."

*Counsel.*—"That is an imputation," replied the Sergeant, "to which I will not submit. I am incapable of putting an improper question to a witness."

*Judge.*—"What imputation, Sir?" enquired the Judge angrily. "I desire that you will not charge me with casting imputations. I say that the question was not properly put, for the expression 'disappear' means to leave clandestinely."

*Counsel.*—"I say, that it means no such thing."

*Judge.*—"I hope that I have some understanding left, and, as far as that goes, the word certainly bore that interpretation, and therefore was improper."

*Counsel.*—"I never will submit to a rebuke of this kind."

*Judge.*—"That is a very improper manner, Sir, for a counsel to address the Court in." *Counsel.*—"And that is a very improper manner for a Judge to address a counsel in."

*Judge.*—"I protest, Sir, you will compel me to do what is disagreeable to me" *Counsel.*—"Do what you like, my Lord." *Judge.*—"Well, I hope I shall manifest the indulgence of a Christian Judge." *Counsel.*—"You may exercise your indulgence or your power in any way your Lordship's discretion may suggest; it is a matter of perfect indifference to me."

*Judge.*—“I have the functions of a Judge to discharge, and in doing so I must not be reproved in this sort of way.”

*Counsel.*—“And I,” replied the undaunted Sergeant, “have a duty to discharge as counsel, which I shall discharge as I think proper, without submitting to a rebuke from any quarter.”

Anxious to terminate this dispute, in which the dignity of the Court was compromised, Mr. Sergeant Lens rose to interfere.

“No, brother; brother Lens,” exclaimed Mr. Sergeant Taddy, “I must protest against any interference.” Sergeant Lens, however, was not to be deterred from effecting his intention, and, addressing the Bench, said:—“My brother Taddy, my Lord, has been betrayed into some warmth.” Here he was stopped by Sergeant Taddy seizing him and pulling him back into his place. “I again,” he exclaimed, protest against any interference on my account. I am quite prepared to answer for my own conduct.”

*Judge.*—“My brother Lens, Sir,” said Judge Parke, has a right to be heard.” *Counsel.*—“Not on my account; I am fully capable of answering for myself.” *Judge.*—“Has he not a right to possess the Court on any subject he pleases?” *Counsel.*—“Not while I am in possession of it, and am examining a witness.” Mr. Justice Parke, then, seeing evidently that the altercation could not be prolonged, threw himself back into his chair and was silent. P. L. R. 1908, p. 83.

(iii) “When a man has a nice, carefully prepared case, and has led up to a certain point, and just when he thinks it is within his grasp, the witness goes back on him and fires his volley, and counsel stands back staggered. It is a most dangerous thing. Juries observe—Juries are quick to notice anything of that sort—that the witness is too much for the counsel—he, could not handle that witness, clever man as he was, and that, therefore, the witness told the truth. Why? By an unconscious process of reasoning, which may be fallacious, but is nevertheless convincing. Therefore, I say if a counsel gets an answer that staggers him, if it takes him un-awares, his proper course and his only safe course is to advance smilingly and calm, and accept it as a compliment rather than as a disappointment 11 Cr. L. J. p. 79.

(iv) There is no time in the practice of the profession, there is no incident in the history of our lives, that requires more calm, a more cool and collected mental condition than that in which the cross-examiner is placed. 11 Cr. L. J. 78.

(v) In a theft case the accused were charged by the Magistrate and they were called upon to further cross-examine the prosecution witnesses under S. 256 Cr. P. C. The accused declined to do so. Afterwards they engaged a lawyer who put in an application for recalling the prosecution witnesses but the Magistrate rejected the application. The accused were called upon to adduce defence. They cited some of the prosecution witnesses in their defence. The prosecution witness entered the witness-box and the counsel began to cross-examine him. The Magistrate at once stopped the cross-examination and remarked that he could not cross-examine his own witness. The lawyer due to his own ignorance at once wrongly admitted his mistake in Court but in a cringing manner requested the Magistrate over and over again to allow him to cross-examine the prosecution witnesses. The request was not granted. The law is pretty clear on the point that when a Magistrate refuses to resummon the prosecution witnesses for cross-examination and the accused cites them as defence witnesses, the accused has a right to cross-examine them as

it does not change their character. 28 C. 594. I. C. W. N. 19, 1922 M. W. N. 120, 1932 N. 137 (1) : 33 Cr. L. J. 940.

This ignorance of law compelled the counsel to take up the cringing attitude otherwise he would have shown a courage and boldness in requesting the Court to see the law on the point and assert that he had a right to cross-examine the witnesses. Therefore, to be bold, one must have competent knowledge of law.

## CHAPTER 28

### Protection of Cross-Examining Counsel

A lawyer is an officer of the Court. He owes a duty both to the Judge and the clients. In his professional duties he has got to ask some unpleasant questions from a witness. It has happened more than once that he has been badly treated by witnesses or opposite parties. In such cases witnesses are not only to be blamed. The cross-examiner has to share the blame because he has shown the want of tact which is the mark of a successful lawyer.

An experienced lawyer will never allow things to come to such a pass. It is a golden rule that the counsel should not be rude or unfair to the witness under cross-examination and the witness often stands in need of protection of the Judge as against such unjust attacks. It often happens that a counsel also stands in a need of such protection from the insolent and over-bearing conduct of the witnesses. The following illustrations will establish the point, that counsels do require protection.

### Illustrations

(i) "Sir Frank Lockwood's numerous suggestions that advocates stood urgently in need of protection from witnesses would acquire a more serious turn if the experience of a defending solicitor like the one stated below became frequent. The charge was made against the manager of one hotel, and the chief witness was a visitor at another. When the defending solicitor asked the titled witness, who was described as the 'Acting Commander of the Royal Naval Reserve and Chief Examining Officer in the British Channel,' whether he had not had a dispute at the hotel against which he was giving evidence, the gentleman called the solicitor 'a rascal,' and a 'shrieker who ought to be in khaki instead of defending trivial cases,' and, when in replying to this outburst, the solicitor quietly remarked that he had served the King for seven years, the unappeased witness saw fit to add, 'Yes, as a volunteer or a dodging special.' Whether the question that excited the angry passions of the witness was a justifiable one or not we have no means of judging. There is certainly nothing on the face of it to excuse so violent and vulgar a display of ill-temper. The agitated witness even contemplated a physical encounter with the cross-examining solicitor. 'If this had occurred outside I would have boxed your ears,' haughtily remarked the 'Acting Commander of the Royal Naval Reserve and the Chief Examining Officer in the British Channel.' Since the exhibition does not appear to have produced any reproof from the Magistrate in whose presence it was made, some measures ought to be taken to indicate that even gentlemen entrusted with important military duties are not entitled, no matter in what capacity they enter the witness-box, to attempt to browbeat even the humblest 'officer of the Court' in the performance of his duty to his client. The sooner they receive some authoritative censure the better," 81 M. L. J. 110-111.

(ii) Some twenty-seven years ago, as the result of Sir Charles Russell's handling of one of the witnesses in the famous Osborne case, a loud outcry was raised against what was called the 'abuse of cross-examination.' A long discussion in the London Times, in which aggrieved witnesses clamoured for protection from

their forensic tormentors was relieved by a lively contribution from Sir Frank Lockwood, narrating an experience of his own cross-examination of a witness at the York Assizes as to the exact position of certain cattle on a road, 'beasts' as they call them in Yorkshire.

"Now, my man," said Lockwood, "you say you saw these animals clearly from where you stood; how far off can you usually see a beast?" The witness, looking critically at Lockwood across the Court replied, "Just about as far off as I am from you." 8 M. L. J. 94, 31 M. L. J. 110.

(iii) In the "Anecdotes of the Bench and the Bar" Mr. Arthur Engelbach tells the story of a carpenter who was subpoenaed as a witness on a trial for assault. One of the counsel, who was much given to browbeating witnesses, asked him what distance he was from the parties when he saw the prisoner strike the prosecutor. The carpenter answered, "Just four feet, five inches and a half." "Pray tell me," said the counsel, "how is it possible for you to be so very exact as to distance?" "Why, to tell you the truth," replied the carpenter, "I thought perhaps that some fool or other might ask me, and so I measured it." 25 M. L. J. 228.

(iv) At a trial in an American Court one of witnesses, an old lady of some eighty years, was closely questioned by the opposing counsel relative to the clearness of her eye-sight.

Q. "Can you see me," said he? A. "Yes."

Q. "How well can you see me?" A. "Well enough," responded the lady, "to see that you are neither a negro, nor an Indian, nor a gentleman."

(v) A counsel who thought probably rightly, that he was not making much of an opposing witness, sat down with the remark, "Well, well, I see you are a clever fellow." It would certainly have been better if the lawyer had not made any such remark. It was not necessary at all. But the making of such a remark was no excuse for the witness replying, as he did "I should have liked, Sir, to return the compliment but you see, I am on my oath." 1 Cr. L. J. 206.

(vi) A farmer, though severely cross-examined on the matter, remained very positive as to the identity of some ducks which he alleged had been stolen from him.

"How can you be so certain?" asked the counsel for the prisoner "I have some ducks of the same kind."

"Very likely," was the cool answer of the farmer; "those are not the only ducks I have had stolen."

In this case, it was not necessary nor proper for the counsel to make any personal reference to his having some ducks of the same kind. But that is no excuse for the witness's answer. 1908 P. L. R. (Jour) 972.

(vii) Cross-examining a witness, counsel asked:

Q. "When you said you were 'satisfied' just now, you meant, I suppose, that you were content?" A. "I did not."

Q. Well, satisfied and content are just the same, are they not?" A. "They are not."

Q. "Well, suppose you explain to the Court and Jury what the difference is?" A. "Sure. I will. Now, for instance, I might be satisfied that it was you I saw out behind the barn kissing my wife Nora, but I would be far from being content."

(viii) The accused was on trial before a military Court and was seated near his counsel, when a witness was brought in and asked the formal question:

Q. "Do you know the accused? If so, state who he is?"

The witness looked at the prisoner and then at his counsel, hesitated a moment and sputtered. "Which one Sir?" 25 M. L. J. 87.

(ix) Once upon a time there was a well-known Sergeant of the name of Cockle. He asked a witness. "Do you like fish?" To which the witness promptly answered, "Yes, but not with Cockle sauce." 25 M. L. J. 222 (Jour.).

(x) A lawyer examining a doctor as an expert witness thus:

Q. "Doctors sometimes make mistakes, don't they?" A. "The same as lawyers, was the reply."

Q. "But doctors' mistakes are buried six feet under ground."

A. "Yes, and lawyers' mistakes sometimes swing six feet in the air." 15 M. L. J. 370.

(xi) In answer to the long hypothetical question of the attorney who called him a doctor, one Mr. Thompson gave it as his opinion that the testator was afflicted with "Senile dementia."

Across the room sat a young attorney on the opposite side with a formidable battery of medical books close to hand. It was his duty to cross-examine the expert and to show his opinion was at variance with the books.

In varying forms the same questions were asked and re-asked at wearisome length. Dr. Thompson stood the ordeal without complaint until nearly midnight. Then the following question was put:

Q. "Doctor, you have give it as your judgment that the testator was suffering from what you are pleased to term 'senile dementia.' Now, I wish you would repeat to this Jury some of the evidence of 'senile dementia' in a patient." A. "Well, the books say, when a man has 'senile dementia' one of the symptoms is to ask the same question over and over again after it has been clearly answered."

No doubt it might not have been proper for the counsel to repeat the same question over and over again. But it is the function of the Court to see whether such repetition is allowed or not. It was no business of the witness to make such an answer as the above. 25 M. L. J. 81.

## CHAPTER 29

### Behaviour of Counsel and Judge During Cross-Examination

#### *Be Respectful to the Court*

1. The second rule is "Be respectful to the Court and to the Jury, kind to your colleagues, civil to your antagonist, but never sacrifice the slightest principle of duty to an over-weening deference towards either." See Paul Brown's Rule No. 9.

2. The lawyer's bearing in Court often has a great influence in determining the result of the litigation in which he appears. His conduct of the cause will necessarily secure either the commendation or the criticism of Judges, Juries, fellow members of the Bar and spectators. His attitude towards the Court should always be characterized by the utmost respect and deference, even should the Judge be imperious and tyrannical. Proper courtesy should also be shown to the opposing counsel even if he should himself prove to be lacking in manners: nothing is so well calculated to disarm a vulgar or impertinent opponent as an unruffled and courteous demeanour. Personalities between counsel in Court should be avoided as far as possible.

3. A lawyer should always preserve his own self-respect even under trying circumstances; perfect self-command will give him an incalculable advantage

over an impudent and waspish adversary ; politeness will often baffle the pettifogger. 14 Cr. L. J. p. 18.

"The Court is very much obliged to any learned gentlemen who beguile the tedium of a legal argument with a little honest hilarity," said Chief Justice E. to a member of the Bar who apologised for a sally that set the Court in a roar of laughter. To judge from the protests which are being made against judicial humour, there are persons who regard even a 'little honest hilarity' as something quite alien to the serious work of Courts. They would not object to a flash of wit from the witness-box they might even tolerate witticism from the Bar, but they appear to think that the dignity of the Bench requires that a judge, no matter how mirthful or tedious the proceedings over which he presides, should sit all day 'like his grandsire cut in the alabaster.' Judicial joking may, no doubt, sometimes be carried to excess. An incident in the judicial career of Sir James Fitzjames Stephen by no means, in the ordinary sense, a judicial humorist, indicates its dangers. He was trying a slander case in which both the parties were Billingsgate salesmen and the counsel for the defendant did not fail to take advantage of the humour of the situation. Mr. H. F. Dickens, who represented the plaintiff, seeing the judge, as well as the rest of the Court, impressed by the jocular aspects of the case, made a strong effort to bring out the serious injury that had been inflicted upon his client. Mr. Justice Stephen, his sense of fairness aroused, was sobered in a moment, and summed up in favour of the plaintiff. After the Jury had returned their verdict he said, "I am very grateful to you for preventing me from doing a great act of injustice." For laughter, though it certainly need not be punished from the Courts, may sometimes create an atmosphere in which the serious character of the work is prejudiced. A 'little honest hilarity' in a Court of Justice is one thing, an habitual striving after mirth-provoking is quite another. 26 M. L. J. p. 156.

With respect to the advocates' duties towards the Court the following rules enacted by the Council of the American Bar embody the highest ideal and afford a precious guide :

"It is the duty of the lawyers to maintain towards the Court a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievance to the proper authorities. In such cases but not otherwise, such charges should be encouraged, and the person making them should be protected."

"It is the duty of the Bar to endeavour to prevent political considerations from outweighing judicial fitness in the selection of judges.

"Marked attention and unusual hospitality on the part of lawyers to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive, and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending case, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favour. A self-respecting independence in the discharge of professional duty without denial or diminution of the courtsey and respect due to the judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

"A lawyer assigned as counsel for an indigent prisoner ought not to be asked to be excused for any trivial reason, and should always exert his best

efforts in his behalf. The key to the solution of any difficulty in a question as to how to behave towards the Court in a particular contingency will not be difficult, if you remember, on the one hand, that you are partakers with the judge in the administration of justice, that your duty is to help him in it, and that, on the other hand, you have a right to expect from the judge that your client should have a fair hearing with respect to his grievances, that as members of an independent profession you have a right to urge every legitimate argument open to you on behalf of your client, and to bring before the Court every material that ought to influence it in its decision. At the same time as members of an honourable profession nothing, again, should be done by you which will in any way be unbecoming as members of the public or as loyal citizens of the state. Nor would you in any case consider it your duty, to do anything which is calculated to diminish your own self-respect or to dwarf your own soul." See 18 M. L. J. 434.

### Illustrations

(i) A good story is told of the late Lord Ashbourne, who was at one time Lord Chancellor of Ireland. Occasionally, says the *Law Times*, in the Court of Appeal, Lord Ashbourne would make up his mind to bring a case to an end before the rising of the Court and it was highly instructive to watch the proceeding.

A junior, who was not conscious of his humour, stood up to open what appeared to be a short interlocutory appeal. Lord Ashbourne, after a sentence or two had been spoken, interjected, "Now, Mr.—why should we reverse the King's Bench order on a point like this?"

"My Lord," rejoined the counsel, "there are six reasons, why the order should be reversed."

"Then," said the president of the Court, "suppose we commence with your three best?"

"No, my Lord," said counsel, "I could not consent to that because I have frequently succeeded in this Court upon my bad points." 25 M. L. J. 140.

(ii) A justice of the Supreme Court of New York had a habit of asking three questions of counsel arguing at the Bar. The first question was usually a simple one—the lawyer answered carelessly; the second question a little more difficult—the respondent answered with some uncertainty; the third question was bound to be a 'poser' fraught with humiliation.

On one occasion, when a lawyer who was quite familiar with his Honour's little habit, was presenting a most important case, he replied in answer to the first question:—"I don't know."

"Don't know?" said his Honour. "Why don't you know?"

"Because, your Honour," said the wily attorney, "I have not heard the other two questions." 26 M. L. J. p. 75.

(iii) Here is an instance of how counsel may gently and respectfully lead the judge to take a proper view of the case. This was an action on a covenant respecting a bill of sale. The fact of the covenant was admitted. The opening of the case by the plaintiff's counsel created an excellent impression on the judge in favour of the plaintiff's case. Even as the plaintiff's counsel was going on with the opening speech, the judge asked defendant's counsel:

"What answer have you got, Mr. Jones, to this action?"

"My Lord," says Jones, with great submission, "I should like to see my learned friend's case before I show him mine."



"Very well," says his Lordship, with a contemptuous toss of the head "only it seems to me that you are bound by the covenant."

"I hope," says Jones, "to alter your Lordship's opinion, with great respect when you have heard my case. At present my friend has not finished operating his."

"Oh, pray me, don't let me interfere," says his Lordship, "but it seemed to me this is a case that might very well be settled."

"Afraid not, my Lord," persists Jones, with great submission.

"I say no more," despondently replies his Lordship, and the case proceeds. The benevolent plaintiff enters the box.

He gives his evidence fairly and temperately. It seems irresistible; and not to be got over or got round by any possibility of advocacy.

The following cross-examination by Jones will show the value of a perfect mastery of details, which enables him to master difficulties that are not organic.

Jones asks Mr. Hawk if he knew a person of the name of Issac Jacobs.

The witness's answer is that he does not know Isaac Jacobs.

Q. "Do you say yes or no?" A. "I cannot say, it is so many years ago."

Q. "Let me help you. Was there a man who used at that time to take possession for you under bills of sale, when you put in execution?"

A. "I never did."

The learned Judge now begins to see there is something in the defendant's case.

Q. "You say Mr. Hawk," asks the Judge, "he never did?" A. "No, certainly not, my Lord."

Q. "Look at this letter," continues the counsel "Is it your writing?"

The letter was read—instructions to Jacobs to take possession of the goods the day after the assignment to Mr. Hawk.

A. Then the plaintiff foolishly said: "But he never did take possession."

Another letter was put into his hand written by the plaintiff, asking for an account of the goods seized.

"Yes," says the plaintiff, "but as he did not give me an account I concluded that he never took possession."

"One more letter and then Hawk may go; it is a copy of one written by Jacobs to Hawk, who does not produce the original, and upon it he has to confess that Jacobs wrote informing him that he had seized, but that the goods were of little value, and would not pay expenses." The result was the case was lost. *Harris' Illustrations in Advocacy*, pp. 24—27.

(iv) In a recent case, when a young Barrister expressed surprise at the ruling of the Judge and was severely criticised for doing so, his leader apologised for him with the observation, "Whenever my junior is as old as I am, he will never be surprised at anything your Lordship says or does." 27 M. L. J. p.60.

(v) A Barrister of standing appeared in an application for review along with the Vakil who previously handled the case. At that time when an application for review was put in, the Judges used almost invariably to ask whether the point proposed to be argued in review had or had not been taken at the first hearing. The Barrister had apparently anticipated this kind of interrogation from the Bench and was prepared for it. Surely enough the learned Judge by whom the application for review was heard, put him the very question and his answer was to this effect: I am not going

to answer your Lordship's question for I know the object of it. If I say the point was taken on the former occasion, your Lordship is going to say that the point must have been considered and disposed of then and cannot be re-opened now. If I say that Point was not taken on the former occasion, your Lordship will at once reject my application by saying there can be no review on a ground not urged on the first occasion." This answer had the desired effect and the Judge was good enough to quietly listen to the application and dispose of it on the merits. 33 M. L. J. p. 101.

**How Counsel and Judges Should Behave.** "Protracted work for hours together and exchange of dealings with numerous lawyers and litigants may sometime make the Judge impatient, specially if he be not physically fit. Some men are constitutionally unfit for what is known as judicial temper. If a Judge has to deal with say fifty person in a day, on him falls the greater portion of the strain and to each individual goes a small fraction of it. It is an intellectual contest all day long and the Judge has to work very long hours under trying circumstances. It is not therefore unnatural; temper should at times get a trifle unruffled. Clever men will realise this feature of the every-day contest and adapt themselves to circumstances. The Judge, too, will realise the difficulties of the advocate. The strain on the advocate is no less severe. He has to keep before him all the facts of the case and to hear attentively the statements of the witnesses. He has to think out questions for cross-examination and to object at once to the admission of irrelevant or inadmissible evidence. He has to keep a vigilant eye on his opponent and to watch the Court. A witness suddenly deposes to facts contrary to his expectation or instruction and he has to make up his mind immediately how to deal with the matter. Even when on his feet he has to think and shape his case according to the facts disclosed at the trial. He may have to take note now and then or to inspect documents produced by the other side. He has to attend constantly to the interruptions of his client who gets unnerved at every statement of his opponent's witnesses. He has to keep his head cool in the midst of these and other distractions. There must be forbearance and toleration on both sides and a desire to help each other in the administration of justice. Impatience or rise of temper cannot be overcome by display of similar impatience or use of indiscreet language. If the Judge has his shortcomings, the advocate should exercise forbearance and try to bring him round without indulging in recrimination. This will never be taken as weakness, but is bound to enhance his reputation. If one fails in his duty, there is no reason why the other should also sin. Judges and lawyers are human and in the heat of the moment they are sometimes apt to forget themselves and to use expressions which they never meant to utter. Instances of friction between the Bench and the Bar are rare, but nevertheless there have been unhappy incidents in the past and there will be more in the future so long as Courts of Justice exist. A spirit of partisanship or rivalry sometimes gets the upper hand and expressions are let loose which one would certainly repent for at cooler moments. Sometimes it is the result of misunderstanding. In most cases a quick *amends* from the offending party is all that is necessary to restore the mental equilibrium." See Sarkar' Modern Advocacy, pp. 126-127.

"It is duty of members of Bar to treat the Bench always with courtesy and deference. It is possible that a judge may sometimes exhibit impatience, or he may appear to be rough. The best way to overcome it is not by exhibiting similar impatience or roughness, but to calmly by bearing with the judge. Consideration for the Bench should never be withheld; it is sure to have advantage of making the Bench itself more considerate. An advocate

should have faith in the absolute impartiality of the Bench. There should be no tendency to suppose that because the Bench—it may be very wrong—sometimes—is unable to see eye to eye with an advocate who is convinced that his view is correct, the Bench is biased or prejudiced. We know very well that what appears very clear to one, may appear very differently to another person, and what appears clear to one at one time appear far from so at another time. One may often be possessed by some one idea; it may happen that that the judge's mind assumes a certain attitude sometimes which the Judge himself is unable to shake off; but it is absolutely necessary that the bar should have faith in the absolute impartiality of the Judge, however much he may be mistaken." *Professional Ethics*, p. 88, 89. The rules enacted by the American Bar with respect to the advocates' duty to the Court have been reproduced elsewhere.

Intentional insult or interruption to any public servant while sitting in at stage of a judicial proceeding is punishable under 'S. 228 I. P. Code read with S. 180 Cr. P. Code. Sundara Aiyar says: "In many a case, if a pleader behaves improperly, there is a very ready remedy open to the Judge instead of making too much of it and proceeding against him to extremes. The best course is to refuse to hear him, until he withdraws any improper statements that he might have made. There would be practically no appeal against such act on the part of the Judge. Sometimes Judges have gone so far as to refuse to hear a particular pleader at all in any case, until he makes reparation for misconduct in the case. It would be mostly quite enough to refuse to hear him in the particular case." *Professional Ethics*, p. 114.

Speaking of Lord Westbury, it may also be stated "there were not many 'scenes' with Westbury, for he was a man of such strong personality that the Judges generally let him have his own way. 'Scenes' occur with Judges who have weakness or fads which distort their vision, and which that persists in intruding into a case. Sir William Bovill was not a satisfactory Judge. He had a fondness for perpetually interrupting forward views of his own, and imputing unfair conduct to counsel and solicitors. In one trial, Mr. Edwin James began his speech to the jury by saying that he greatly regretted that so much of their time had been wasted, but for this neither he nor his opponent, Sir George Honyman, was to blame. Continuing, he said, that, as the jury were aware, it was the province and duty of counsel, before a case came into Court, to study it with the view of presenting the material facts to the jury. But his Lordship who filled an office for which he had the highest respect but who should have known nothing whatever of the case it came into Court, have deemed himself far more competent to deal with the case than either his learned friend or himself, and thus there had been great waste of time to the inconvenience of the jury and the prejudice of all concerned," 13 Cr. L. J. pp 108-109.

On this point Colonel Henderson said:—"Your main capital is confidence. If you ever succeed, it will be because the people have confidence in you. That is a plant of slow growth. The last man on earth you ought to deceive, or try to deceive, is the Judge of the Court. You cannot do it without being found out, and when you are found out, your stock goes down to fifty cent on the dollar, although he may not tell you so. The Judge will find out a lawyer sooner than any other man in the court-house. Neither ought a lawyer to deceive, or try to deceive the jury. His whole effort ought to be to develop the truth, just as analysis would prove whether eye-glasses are rimmed with gold or brass. It would tell the truth. I have heard a lawyer boast that a certain case had been presented to a lawyer and he turned it down that the man then brought the case to him, that he put it into Court, gained it for him, and

got some money. That is a mighty dangerous thing to do. It is a mighty lucky thing if you gained that verdict by a little twistification. The man for whom you gained the law suit has lost confidence in your integrity and the more it is talked about, the wider the zone in which it will be discussed against you. No lawyer ought to boast of such practice, for there is always a suspicion that he has gained a case that he ought not to have gained. He may succeed, but he has a brand upon him that he will carry all his life. And yet I have heard young lawyers boast about this." 14 Cr. L. J. 25.

There should always be a spirit of give and take between the Bench and the Bar. The counsel in his zeal for the best interest of his clients sometimes becomes over-zealous and this leads to altercation between the Judge and the counsel. At times the Judge takes a serious view of such a thing and starts proceedings for contempt of Court.

Bombay High Court has ruled that some latitude should always be allowed to a member of Bar insisting in the conduct of case upon his questions being taken down or his objection noted where the court thinks the questions inadmissible or untenable there ought to be a spirit of give and take between Bench and Bar in such matter and every little persistence on the part of the pleader should not be turned into the occasion of the criminal trial unless the pleader's conduct is so vexatious as to lead to the inference that his intention is to insult or interrupt the court. 6 Bom. L. R. 541 (543: 1 Cr. L. J. 612).

The conduct of the counsel should always be dignified and if he is insulted by the Judge, he should be tactful to administer a mild rebuke though couched in a respectful language. The Judge should not readily take the remark of the counsel as insulting and the Courts should not be unduly sensitive about their attitude. 29 M. L. J. 274.

The following illustrations will show that the conduct of the lawyer is not justifiable although the conduct of Judge contributed to the remarks by the counsel. In some cases the conduct of the Judge is equally to blame.

### Illustrations.

(i) Lord Campbell, President of the English Court of Session, was somewhat addicted to browbeating counsel. He usually got it all his own way. Upon one occasion, however, he caught a tartar. His Lordship had what are termed little pig's eyes, and his voice was thin and weak. Council, one Mr. Corbett, had been pleading before him and was attacked in the usual style by the President when he thus addressed him:—

"My Lord, it is not for me to enter into any altercations with your Lordship, for no one knows better than I do the greatest difference between us, you occupy the highest place on the Bench, I the lowest at the Bar and then, My Lord, I have not your Lordship's voice of thunder and the controlling eyes. It was not proper for counsel to have made such a remark.

(ii) In an English case, one Mr. Strachan thus rebuked a Judge for interrupting him. After interposing on several occasions this Judge said:—"Look here, Sir, your arguments are just going in at one ear and out at the other."

"Well my Lord, what is there to prevent it?" queried counsel.

"Such a remark on the part of the counsel can scarcely be justified." 26 M. L. J. p. 77.

(iii) Several decades ago there lived in an American State, a Judge noted for his boorish manners, a very financial lawyer whom he especially disliked was once trying a case before him, and all the while the Barrister spoke, the Judge sat with his feet elevated on the railing, in front of him, hiding his face.

Exasperated by this the lawyer qucried :—

"May I ask which end of your Honour I am to address?"

"Whichever you choose," drawled the Judge.

"Well," was the retort, "I suppose there is as much law in one end as the other." 5 M. L. T. p. 80.

(iv) Once, at the Assizes of an English county, a Barrister, while pleading was interrupted by the Judge :—

"Mr. Carter you are wasting the time of the Court?"

"Time of the Court," retorted the truculent veteran, glaring fiercely at the Bench, "Your Lordship means,—Your Lordship's dinner."

The Judge threw up his hands in despair, and Carter continued his harangue in piece.

The same redoubtable advocate was on another occasion defending a man charged with obtaining money under false pretences, said he with fine scorn "Why we all make them every day, Barristers and Solicitors and judges—the whole lot of us. Talk about the purity of the Judicial ermine." Here he pointed out decisively to the learned Judge, who sat covering on the Bench.

"Why, it is only rabbit skin?" Shouts of laughter greeted this irreverent statement. 27 M. L. J. p. 157.

(v) Bethell, afterwards Lord Westbury, confessedly adopted as a ruling principle the maxim: "Never give into a Judge," and his overwhelming egotism enabled him to successfully carry off situations that would have brought a less fearless man to grief. All his sayings have a touch of bitterness and cynicism, and in reading those accounts most brilliant one somehow feels that they savor of what might be termed colossal cheek rather than legitimate repartee.

"Take note of that," he once said in a stage aside to his Junior.

"His Lordship says, he will turn it over in what he is pleased to call his mind."

The discursive habits of Lord Justice Knight Bruce he detested.

"Your Lordship," he once pointly cut short an observation of that Judge by declaring, "Your Lordship will hear my client's case first and if your Lordship thinks it right, your Lordship can express surprise afterwards." 25 M. L. J. p. 79.

(vi) A learned counsel (Mr. Brougham, as some say) when the Judges had retired for a few minutes in the midst of his argument, in which, from their interruptions and objections he did not seem likely to be successful, went out of Court too, and on his return stated he had been drinking a pot of porter. Being asked whether he was not afraid that this beverage might dull his intellect, "That is just what I want it to do," said he, "to bring me down, if possible, to the level of their Lordships' understanding." 18 M. L. J. p. 123.

(vii) In the Court of the Common Pleas, on the trial of Thirlall v. Beams, Mr. Sergeant Taddy was examining a witness, and asked him a question respecting some event that had happened since the plaintiff had disappeared from that neighbourhood.

Mr. Justice Parke immediately observed: "That is a very improper question and ought not to have been asked."

Counsel :—"That is an imputation," replied the Sergeant, "to which I will not submit. I am incapable of putting an improper question to a witness."

Judge :—"What imputation, Sir?" enquired the Judge angrily. "I desire that you will not charge me with casting imputations. I say that the

question was not properly put, for the expression 'disappear' means 'to leave clandestinely.'"

*Counsel* :—"I say, that it means no such thing."

*Judge* :—"I hope that I have some understading left, and, as far as that goes, the word certainly bore that interpretation, and therefore was improper."

*Counsel* :—"I never will submit to a rebuke of this kind."

*Judge* :—"That is a very improper manner, Sir, for a counsel to address the court in."

*Counsel* :—"And that is a very improper manner for a Judge to address a counsel in."

*Judge* :—"I protest, Sir, you will compel me to do what is disagreeable to me."

*Counsel* :—"Do what you like, My Lord."

*Judge* :—"Well, I hope I shall manifest the indulgence of a Christian Judge."

*Counsel* :—"You may exercise your indulgence or your power in any way your Lordship's discretion may suggest, it is a matter of perfect indifference to me."

*Judge* :—"I have the functions of a Judge to discharge, and in doing so I must not be reproved in this sort of way."

*Counsel* :—"And I," replied the undaunted Sergeant, "have a duty to discharge as counsel, which I shall discharge as I think proper, without submitting to a rebuke from any quarter."

Anxious to terminate this dispute, in which the dignity of the Court was compromised, Mr. Sergeant Lens rose to interfere.

"No, brother Lens," exclaimed Mr. Sergeant Taddy, "I must protest against any interference." Sergeant Lens, however, was not to be deterred from effecting his intention, and, addressing the Bench, said :—"My brother Taddy my Lord, has been betrayed into some warmth," Here he was stopped by Sergeant Taddy seizing him and pulling him back into his place. "I again," he exclaimed, "protest against any interference on my account. I am quite prepared to answer for my own conduct."

*Judge* :—"My brother Lens, Sir," said Judge Parke, "has a right to be heard."

*Counsel* :—"Not on my account; I am fully capable of answering for myself."

*Judge* :—"Has he not a right to possess the Court on any subject he pleases?"

*Counsel* :—"Not while I am in possession of it, and an examining a witness," Mr. Justice Parke, then, seeing evidently that the altercation could not be advisably prolonged, threw himself back into his chair and was silent. P. L. R. 1908, p. 83.

(viii) A vakil from a District Court came to the Chief Court to argue an appeal. The gentleman was very learned. He belonged to an old type of gentleman, who always, believed in simple living and high thinking. He was dressed in long achkan silk turban and a Dopata round the neck. The case was a very complicated one and therefore he brought three or four boxes of books. When he stood up to argue the case, the Judge eyed him from head to foot thrice and throwing a contemptuous glance at him in a very overbearing manner asked him, "Have you ever appeared in this Court before?" The Vakil, who

was the leader of the District Bar and who was held in high esteem by the public, at once understood that the Judge was greatly annoyed with his manner of putting on the dress and means to insult him. His anger was roused and replied: "My Lord, more than once, in better times, before better Judge. This settled the whole affair.

## CHAPTER 30

### Behaviour of Counsels Towards Each Other.

#### *By Respectful to Your Colleagues.*

The professional etiquette requires that a counsel should behave respectfully towards his fellow brethren. Some counsels think that unless they run down and virtually abuse the counsel on the opposite side their case is half done. "If you have a bad case, abuse the opposing counsel" is a trite saying. If there is any indiscriminate expression on the part of the counsel, the opposing counsel should not take up the cudgel and create scene in the Court of law. He can administer a mild rebuke in a dignified language. If both the counsels fell out in Court and use undignified language they not only lower themselves in the estimation of the persons present in Court but they also lower the reputation and prestige of the honourable profession to which they belong. Wit and humour are the outstanding qualities of a successful lawyer, and should be employed on such occasions.

#### Illustrations.

(i) The high regard in which Sir Rufus Isaacs has been held by the Bench was fitly expressed by Lord Sumner of Ibsstone at the recent Hardwicke Banquet, when he described him as having uniformly showed at the Bar the ardour of an athlete and the spirit of a sportsman. 25 M. L. J. 265.

The following remark was once made by a lawyer in commenting on the argument of the counsel for the other side:—"The argument of my learned and brilliant brother," said the counsel for the plaintiff in a suit for damages from a Streetcar Corporation in Boston, "is like the snow now falling outside, it is scattered here, there and everywhere. "All I can say," remarked the opposing counsel, when his opportunity for reply came, "is that I think the gentleman who likened my argument to the snow now falling outside may have neglected to observe one little point to which I flatter myself—the similarity extends—it has covered all the ground in a very short time." 29 M. L. J. 63.

(ii) One Mr. Shee (the counsel who appeared on the other side) was asking the witness to be circumspect in his replies, when Sir E. Carson interrupted with the remark: "You are very much afraid of your own witnesses."

Mr. Shee retorted: "I am very much afraid of you." 5 M. L. T. 107.

(iii) General Sabine, Governor of Gibraltar, having failed in his attempts to extort money from a Jew, sent him back by force to Tetuan in Morocco, from whence he had come to Gibraltar. The Jew afterwards went to England and sued the Governor for damages. Mansfield who had then received his title, was counsel for the Governor. In the course of his defence before the jury he said: "True, the Jew was banished, but where? Why, to the place of his nativity. Where is the cruelty, where the injustice of banishing a man to his own country?"

Mr. Nowell, counsel for the Jew, retorted: "Since my learned friend thinks so lightly of the matter, I ask him to suppose the case his own, would he like to be banished to his native land?" The Court rang with peals of laughter, in which Mansfield himself joined with a good will." *The Central Law Journal*, Vol. 81, No. 7.

(iv) "Two counsels were arguing an appeal before a District Judge. On a certain point they came to grips and called each other "silly ass," "donkey," and several other names. The Judge who was sitting silently and enjoying this repartee; quietly remarked. "Gentlemen, now that you have fully recognized each other, let us proceed with the appeal."

(v) Counsel for the plaintiff stood full seven foot, while the defendants' Advocate was a short statured gentleman, though very witty. They had a heated discussion on a certain point and being exasperated the plaintiff's counsel said "I will put you in my pocket."

"Then" retorted the defendant's counsel "you will have more law in your pocket than you have in your head."

### Behaviour of Senior Counsel towards Junior

"An advocate should treat all brethren equally, whether they are senior or junior. I need hardly repeat that courtsey and good-will are due to all. But apart from that, equality of treatment is required in a higher degree. Take the case of a senior for instance. He should treat all the juniors with equal consideration. He should not push some juniors to the front over the heads of the others. He should not deprive any junior of the opportunity of getting an engagement by showing any preference to particular juniors." Professional Ethics, p. 323. There is now much death of work for the juniors on account of overcrowding at the Bar, and some relief is possible if a rule is adopted by the Bar Association that every senior with large practice should get by rotation engagement for a number of junior allotted to him, whenever there is an opportunity. "Nothing in the manner in which a senior treats his junior should lead to any impression on the part of the client that the junior is not liked or his services are not appreciated by the senior. A generous senior will applaud the services of his junior to his client and would recognize the value of his work in the presence of his client whenever he can do so properly, but even if a junior is not able to do his work properly; the senior should abstain from commenting on his work in the presence of the clients" Professional Ethics, p. 325.

"To juniors another piece of advice is necessary. It is natural that they should like to produce an impression on the mind of the client that their services are of value. But no junior should do anything which will prejudice his senior in the estimation of the client. He should not detract from the value of the work done by the senior. It may be that, in many cases, a great portion of the work is to be done by the junior. He should not, by any statement or conduct on his own part, make the client think that he is the more important factor in the case, and any criticism respecting the senior should be strictly avoided. It is a failing, natural perhaps, but very much to be deprecated for the junior to attempt to get credit for success when it is achieved. Neither the senior nor the junior should do so. So far as the client is concerned they are to regard themselves as one, and if a case fails, the junior ought strictly to abstain from any statement to his client that failure was due to the senior not taking his suggestion or advice." Professional Ethics, pp. 330-331. "At the same time a junior should not be too submissive to a senior. It is often the fact that a particular point of view does not strike the senior, and the mention of it may not enable him to appreciate it at once. By all means let the junior press his view with the respect due to the senior firmly and with independence, but here his duty is at an end." Professional Ethics, pp. 322, 333. "It may happen sometimes that a senior considers a case hopeless, not worth arguing. The junior takes a very different attitude. He thinks there are very fair chances of success. If the junior is capable and his advocacy is good, a senior should be acting rightly in such a



case to leave the argument to the junior. Some of the best counsel in Madras have often acted on that view. It may also happen that the junior is more capable than the senior. The senior may know it. He may feel that this junior's argument is likely to succeed, while his own may not. I have no doubt that in such a case, it would be most proper for the senior to allow the client to have the benefit of the junior's argument. I do not suggest that he should do anything which will be detrimental to his own reputation. But I do not think the reputation of a person would be seriously affected by recognising the superior capacity of another. Generally, every man is rated at his proper worth by the public, and I think a senior's reputation will be enhanced by recognising merit in others. Professional Ethics, p. 337. A junior counsel who has just come out of the portals of the college is very shy and stands in need of encouragement from senior members of the Bar.

### Illustrations.

(i) Sir Edward Clarke; very often the junior practitioner stands in need of encouragement from the senior members of the Bar, once said:—My first case reported at the Bar before the 'Law Reports' existed, which is found in the Law Journal, was on April 27, 1865, when I was a junior to MacMahon in an extradition case, and the leader on the other side was Hardinge Giffard. My leader was just finishing his argument, and Giffard spoke to me and said, 'How long do you think you will be?' 'Oh,' said I, 'I don't think he has left anything for me to say, I do not see why I need follow.' 'Never mind,' said Giffard, 'you go on,' You want the Judge to know you, and you want to get used to hearing your own voice in Court. I followed the good advice, and I have been grateful for it during all the 50 years that have passed since. From that day to this, Hardinge Giffard has been my kind friend." 27 M. L. J. 94.

(ii) In a suit recently tried in an American Court, a young lawyer of limited experience was addressing the jury on a point of law when, good-naturedly; he turned to the opposing counsel, a man of much more experience than himself, and asked: "That is right I believe. Colonel Hopkins?"

Whereupon Hopkins, with a smile of conscious superiority, replied:

"Sir, I have an office in Richmond wherein I shall be delighted to enlighten you on any point of law for a consideration."

The youthful attorney, not in the least abashed, took from his pocket a half dollar piece, which he offered Colonel Hopkins with this remark:

"No time like the present. Take this, Sir, tell us what you know and give me the change." 17 M. L. J. 238.

(iii) "With the Bar, the relations of the new Lord Chief Justice Sir Rufus Isaacs have always been most happy. He has displayed a *comaraderie* which has made him immensely popular with all ranks of the profession. Even when the pressure of his enormous practice has been most heavy, his cheeriness of mood and sense of comradeship, appreciated by the humblest junior not less than by his nearest rival, have deserted him. Unless the Serjeant in the 'Canterbury,' he has seemed less busy than he was, and has always found time for those little touches of intimate courtsey which made a great leader of the Bar so popular with his fellows. The affectionate regard in which the new Lord Chief Justice is held by the Bar has frequently been expressed by its leaders. Speaking at a dinner given in honour of Sir Rufus Isaacs when he was appointed Attorney-General, Sir John Simon used these words: It is his warm hearted willingness to be friendly to his juniors, more than even his splendid qualities of intellect, which has caused his appointment as head of the profession to be welcomed by

every member of the Bar.' His doughtiest opponent, Sir Edward Carson, who was present on the same occasion, observed that Sir Rufus had always preserved the highest traditions of the Bar of England, and that, though he hit hard, he never hit below the belt. 25 M. L. J. 265.

## CHAPTER 31

### Etiquette and Professional Ethics

In the foregoing chapters, certain observations have been made with regard to the behaviour of a counsel towards the Judge and his brother practitioners. The subject is too important to be lightly possessed over.

Without proper etiquettes, deportment and professional ethics, a counsel is no more than a hired person to abuse his opposing counsel and quarrel in a Court of law. "We must conform to a certain extent, to the conventionalities for they are ripened results of a varied and long experience," *A. A. Hodge*.

Every profession has certain rules of conduct and technique. The following fifty Resolutions are reproduced from Hoffman's Course of Legal Study :—

I. I will never permit professional zeal to carry me beyond the limits of sobriety and decorum, but bear in mind, with Sir Edward Coke, that "if a river swell beyond its banks, it loseth its own channel."

II. I will espouse no man's cause out of envy, hatred or malice, towards his antagonist.

III. To all Judges, when in Court, I will ever be respectful; they are the Law's viceregents; and whatever may be their character and deportment, the individual should be lost in the majesty of office.

IV. Should Judges, while on the bench, forget that, as an officer of their Court, I have rights and treat me even with disrespect, I shall value myself too highly to deal with them in like manner. A firm and temperate remonstrance is all that I will ever allow myself.

V. In all intercourse with my professional brethren, I will be always courteous. No man's passions shall intimidate me from asserting fully my own or my clients' rights and no man's ignorance or folly shall induce me to take any advantage of him; I shall deal with them all as honourable men, ministering at our common altar. But an act of unequivocal meanness or dishonesty, thought it shall wholly sever any personal relation that may subsist between us, shall produce no change in my deportment when brought in professional connection with them; my client's rights and not my own feelings are then alone to be consulted.

VI. To the various officers of the Court I will be studiously respectful; and specially regardful of their rights and privileges.

VII. As a general rule, I will not allow myself to be engaged in a cause to the exclusion, of or even in participation with, the counsel previously engaged, unless at his own special instance, in union with this client's wishes; and it must, indeed, be a strong case of gross neglect or of fatal inability in the counsel, shall induce me to take the cause to myself.

VIII. If I have ever had any connection with a cause I will never permit myself (when that connection is from any reason served) to be engaged on the side of my former antagonist. Nor shall any change in the *formal aspect* of the cause induce me to regard it as a ground of exception. It is

a poor apology for being found on the opposite side, that the present is but the *ghost* of the former cause.

IX. Any promise or pledge made by me to the adverse counsel shall be strictly adhered to by me: Nor shall the subsequent instructions of my client induce me to depart from it, unless I am well satisfied it was made in error; or that the rights of my client would be materially impaired by its performance.

X. Should my client be disposed to insist on captious requisitions, or frivolous or vexatious defences, they shall be neither enforced nor countenanced by me. And if still adhered to by him from a hope of pressing the other party into an unjust compromise, or with any other motive, he shall have the option to select other counsel.

XI. If after duly examining a case, I am persuaded that my client's claim or defence (as the case may be) cannot, or rather ought not to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonourable use of legal means, in order to gain a *portion* of that the *whole* of which I have reason to believe would be denied to him both by law and justice.

XII. I will never plead the statute of Limitations, when based on the mere *efflux of time*; for if my client is conscious he owes the debt, and has no other defence than the *legal bar*, he shall never make me a partner in his knavery.

XIII. I will never plead or otherwise avail of the bar of *Infancy*, against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defence than that it was contracted by him when under the age of twenty-one years, he must seek for other counsel to sustain him in such a defence. And although in this, as well as in that of limitation, the *law* has given the defence and contemplates in the one case to induce claimants to a timely prosecution of their rights, and in the other, designs to protect a class of person, who by reason of tender age are peculiarly liable to be imposed on,—yet in both cases, *I shall claim to be the sole judge* (the pleas not being compulsory) of the occasions proper for their use.

XIV. My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In *civil* cases, if I am satisfied from the evidence, that the *fact* is against my client, he must excuse me if I do not see as he does, and do not press it; and should the *principle* also be wholly at variance with sound law, it would be dishonourable folly in me to endeavour to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.

XV. When employed to defend those charged with crimes of the deepest dye, and evidence against them, whether legal, or moral, be such, as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavours to arrest or to impede the course of justice, by special resorts to ingenuity—to the artifices of eloquence—to appeals to the morbid and fleeting sympathies of weak juries, or of temporising Courts—to my personal weight of character—nor finally to any of the overweening influences I may possess, from popular manners, eminent talents, exalted learning, etc. Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honourable profession; and indeed to no intervention beyond securing to them a fair and dispassionate investigation of the *facts* of their cause, and the due application

of the law : all that goes beyond this either in manner or substance, is unprofessional and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive, which sets a higher value on professional display and success than on truth and justice, and the substantial interests of the community. Such an inordinate ambition, I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station. The parricide, the gratuitous murderer, or other perpetrator of like revolting crimes, has surely no such claim on the commanding talents of a profession whose object and pride should be the suppression of all vice, by the vindication and enforcement of the laws. Those, therefore, who, wrest their proud knowledge from its legitimate purposes, to pollute the streams of justice, and to screen such foul offenders from merited penalties, should be regarded by all (and certainly shall be by me) as ministers at a holy altar, full of high pretension, and apparent sanctity, but inwardly base, unworthy, and hypocritical—dangerous in the precise ratio of their commanding talents and exalted learning.

XVI. Whatever personal influence I may be so fortunate as to possess shall be used by me only as the most valuable of my possessions, and not be cheapened or rendered questionable by a too frequent appeal to its influence. Their is nothing more fatal to *Weight of Character* than its common use ; and especially that unworthy one, often indulged in by eminent counsel, of solemn assurances to eke out a sickly and doubtful cause. If the case be a good one, it needs no such appliance ; and if bad, the artifice ought to be too shallow to mislead any one. Whether one or the other, such personal pledges should be *very sparingly* used, and only on occasions which obviously demand them ; for if more liberally resorted to, they beget doubts where none may have existed, or strengthen those which before were only feebly felt.

XVII. Should I attain that eminent standing at the bar which gives *authority* to my opinions, I shall endeavour, in my intercourse with my junior brethren, to avoid the least display of it to their prejudice. I will strive never to forget the days of my youth, when I too was feeble in the law, and without standing. I will remember my then ambitions aspirations (though timid and modest) nearly blighted by the inconsiderate or rude and arrogant deportment of some of my seniors ; and I will further remember that the vital spark of my early ambition might have been wholly extinguished, and my hopes been for ever ruined, had not my own resolutions, and a few generous acts of some others of my seniors ; raised me from my depression. To my juniors, therefore, I shall ever be kind, and encouraging ; and never too proud to recognise distinctly that on many occasions it is quite probable their knowledge may be more accurate than my own, and that they, with their limited reading and experience, have seen the matter more soundly than I, with my much reading and long experience.

XVIII. To my clients I will be faithful ; and in their causes zealous and industrious. Those who can afford to compensate me, *must do so* ; but I shall never close my ear or heart because my client's means are low. Those who have none, and who have just causes, are of all others, the best entitled to sue, or be defended ; and they shall receive a due portion of my services cheerfully given.

XIX. Should my client be disposed to compromise, or to settle his claim, or defence, and especially if he be content with a verdict, or judgment, that has been rendered ; or, having no opinion of his own, relies with confidence on mine, I will in all such cases greatly respect his wishes and real interests. The further prosecution therefore of the claim or defence (as the case may be) will be recommended by me only when, after mature deliberation, I am satisfied that the

chances are decidedly in his favour; and I will never forget that the pride of professional opinion on my part, or the spirit of submission or of controversy (as the case may be), on that of my client, may easily mislead the judgment of both, and cannot justify me in sanctioning, and certainly not in recommending, the further prosecution of what *ought* to be regarded as a hopeless cause. To *keep up the ball* (as the phrase goes) at my client's expense, and to my own profit, must be dishonourable; and however willing my client may be to pursue a phantom, and to rely implicitly on my opinion, I will terminate the controversy as conscientiously for him as I would were the cause my own.

XX. Should I not understand my client's cause, after due means to comprehend it, I will retain it no longer, but honestly confess it, and advise him to consult others whose knowledge of the particular case may probably be better than my own.

XXI. The wealthy and the powerful shall have no privilege against my client that does not equally appertain to others. None shall be so great as to rise, even for a moment, above the just requisitions of the law.

XXII. When my client's *reputation* is involved in the controversy it shall be, if possible, judicially passed on. Such cases do not admit of compromise, and no man's elevated standing shall induce me to consent to such a mode of settling the matter: the *amende* from the great and wealthy to the ignoble and poor should be free, full and open.

XXIII. In all small cases in which I may be engaged I will as conscientiously discharge my duty as in those of magnitude; always recollecting that "small" and "large" are to clients relative terms, the former being to a poor man what the latter is to a rich one, and, as a young practitioner, not forgetting that large ones, which we have not, will never come, if the small ones, which we have are neglected.

XXIV. I will never be tempted by any pecuniary advantage, however great, nor be persuaded by any appeal to my feelings, however strong, to purchase, in whole or in part, my client's cause. Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if not, then to induce others to do so. But in no case will I permit either my benevolence or avarice, his wants or his ignorance, to seduce me into any participation of his *pending* claim or defence. Cases may arise in which it would be mutually advantageous thus to bargain, but the experiment is too dangerous, and my rule too sacred to admit of any exception, persuaded as I am that the relation of client and counsel, to be preserved in absolute purity, must admit of no such privilege, however guarded it may be by circumstances; and should the special case alluded to arise, better would it be that my client should suffer and I lose a great and honest advantage than that any discretion should exist in a matter so extremely liable to abuse and so dangerous in precedent. And though I have thus strongly worded my resolution, I do not thereby mean to repudiate as wholly inadmissible the taking of *contingent fees*,—on the contrary they are sometimes perfectly proper, and are called for by public policy no less than by humanity. The distinction is very clear. A claim or defence may be perfectly good in law and in justice, and yet the expenses of litigation would be much beyond the means of the claimant or defendant—and equally so as to counsel, who, if not thus contingently compensated in the ratio of the risk, might not be compensated at all. A contingent fee looks to professional compensation only on the final result of the matter in favour of the client. None other is offered or is attainable. The claim or defence never can be made without such an arrangement; it is voluntarily tendered, and necessarily accepted or rejected, *before* the institution of any proceedings. It flows not from the influence of counsel over

client, both parties have the option to be off; no expenses have been incurred; no moneys have been paid by the counsel to the client; the relation of borrower and lender, of vendor and vendee, does not subsist between them,—but it is an independent contract for the services of counsel, to be rendered for the contingent avails of the matters to be litigated. Were this denied to the poor man, he could neither prosecute nor be defended. All of this differs essentially from the object of my resolution, which is against *purchasing*, in whole or in part, my client's rights, after the relation of client and counsel in respect to it has been fully established—after the strength of his case has become known to me—after his total pecuniary inability is equally known—after expenses have been incurred which he is unable to meet—after he stands to me in relation of debtor—and after he desires *money from me* in exchange for his pending rights. With this explanation, I renew my resolution never so to *purchase* my client's cause, in whole or in part; but still reserve to myself, on proper occasions and with proper guards, the professional privilege (denied by no law among us) of agreeing to receive a contingent compensation *freely offered* for services *wholly to be* rendered, and when it is *the only* means by which the matter can either be prosecuted or defended. Under all other circumstances, I shall regard contingent fees as obnoxious to the present resolution.

XXV. I will retain no client's funds beyond the period in which I can with safety and ease put him in possession of them.

XXVI. I will on no occasion blend with my own my client's money. If kept *distinctly as his*, it will be less liable to be considered *as my own*.

XXVII. I will charge for my services what my judgment and conscience inform me is my due, and nothing more. If that be withheld, it will be not fit matter for *arbitration*, for no one but myself can adequately judge of such services, and after they are successfully rendered, they are apt to be ungratefully forgotten. I will then receive what the client offers, or the laws of the country may award,—but in either case, he must never hope to be again my client.

XXVIII. As a general rule, I will carefully avoid what is called "*taking of half fees*." And though no one can be so competent as myself to judge what may be a just compensation for my services, yet, when the *quiddam honorarium* has been established by usage or law, I shall regard as eminently dishonourable all *under-bidding* of my professional brethren. On such a subject, however, no inflexible rule can be given to myself, except to be invariably guided by a lively recollection that I belong to an honourable profession.

XXIX. Having received a retainer for contemplated services, which circumstances have prevented me from rendering, I shall hold myself bound to refund the same, as having been paid to me on a consideration which has failed; and, as such, subject to restitution on every principle of law, and of good morals,—and this shall be repaid not merely at the instance of my client but *ex mero motu*.

XXX. After a cause is finally disposed of, and all relation of client and counsel seems to be for ever closed, I will not forget that it once existed; and will not be inattentive to his just requests that all of his papers may be carefully arranged by me and handed over to him. The execution of such demands, though sometimes troublesome, and inopportune or too urgently made, still remains a part of my professional duty, for which I shall consider myself already compensated.

XXXI. All opinions for clients, verbal or written shall be *my opinions*, deliberately and sincerely given, and never *venal and fluttering to their wishes or their vanity*. And though clients sometimes have the folly to be better pleased with having their views confirmed by an erroneous opinion than their wishes or

hopes thwarted by a sound one, yet such assertion is dishonest and unprofessional. Counsel, in giving opinions, whether they perceive this weakness in their clients or not, should act as *judges*, responsible to God and man, as also especially to their employers, to advise them soberly, discreetly and honestly to the best of their ability, though the certain consequence be the loss of large prospective gains.

XXXII. If my client consents to endeavour for a compromise of his claim or defence, and for that purpose I am to commune with the opposing counsel or others, I will never permit myself to enter upon a system of tactics, to ascertain who shall overreach the other by the most nicely balanced artifices of disingenuousness, by mystery silence, obscurity, suspicion, vigilance to the letter, and all other machinery used by this class of tacticians to the vulgar surprise of clients, and the admiration of a few ill-judging lawyers. On the contrary, my resolution in such a case is, to examine with care, previously to the interview, the matter of compromise; to form a judgment as to what I will offer or accept; and promptly, frankly, and firmly to communicate my views to the adverse counsel. In so doing no light shall be withheld that may terminate the matter as speedily and as nearly in accordance with the rights of my clients as possible; although a more dilatory, exacting and wary policy might finally extract something more than my own or even my client's hopes. Reputation gained for this species of skill is sure to be followed by more than an equivalent loss of character: shrewdness is too often allied to unfairness—caution to severity—silence to disingenuousness—wariness to exaction—to make me covet a reputation based on such qualities.

XXXIII. What is wrong is not the less so from being common. And though few *dare to be singular*, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than wrong, though with a multitude. If, therefore, there be among my brethren, any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing I unhappily come in collision with what is (erroneously I think) too often denominated the policy of the profession. Such cases, fortunately, occur but seldom,—but when they do, I shall trust to that moral firmness of purpose which shrinks from no consequences, and which can be intimidated by no authority, however ancient or respectable.

XXXIV. Law is a deep science; its boundaries, like space, seem to recede as we advance; and though there be as much of certainty in it as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed. Its acquisition is more than the labour of a life, and after all can be with none the subject of an unshaken confidence. In the language, then, of a late beautiful writer (Mrs. Jameson) I am resolved to “consider my own acquired knowledge but as a torch flung into an abyss, making the darkness visible, and showing me the extent of my own ignorance.”

XXXV. I will never be voluntarily called as a witness in any cause in which I am counsel. Should my testimony, however, be so material that without it my client's cause may be greatly prejudiced, he must at once use his option to cancel the tie between us in the cause, and dispense with my further services, or with my evidence. Such a dilemma would be anxiously avoided by every delicate mind, the union of counsel and witness being usually resorted to only a forlorn hope in the agonies of a cause, and becomes particularly offensive when its object be to prove an *admission* made to such counsel by the opposite litigant. Nor will I ever recognize any distinction in this respect between my knowledge



of facts acquired before and since the institution of the suit, for in no case will I consent to sustain by my testimony any of the matters which my interest and professional duty render me anxious to support. This resolution, however, has no application whatever to facts contemporaneous with and relating merely to the prosecution or defence of the cause itself; such as evidence relating to the contents of a paper unfortunately lost by myself or by others—and such like matters which do not respect the original merits of the controversy, and which, in truth, adds nothing to the one existing testimony; but relates merely to matters respecting the conduct of the suit, or to recovery of lost evidence; nor does it apply to the case of gratuitous counsel,—that is, to those who have expressly given their services voluntarily.

XXXVI. Every letter or note that is addressed to me shall receive a suitable response, and in proper time. Nor shall it matter from whom it comes, what it seeks, or what may be the terms in which it is penned. Silence can be justified in no case; and though the information sought cannot or ought not to be given, still decorum would require from me a courteous recognition of the request, though accompanied with a firm withholding of what has been asked. There can be no surer indication of vulgar education than neglect of letters and notes; it manifests a total want of that tact and amenity which intercourse with good society never fails to confer. But that *dogged silence* (worse than a rude reply) in which some of our profession indulge on receiving letters offensive to their dignity, or when dictated by ignorant importunity, I am resolved never to imitate—but will answer every letter or note with as much civility as may be due, and in as good time as may be practicable.

XXXVII. Should a professional brother, by his industry, learning, and zeal, or even by some happy chance, become eminently successful in causes which give him large pecuniary emoluments, I will neither envy him the fruits of his toils or good fortune, nor endeavour by any indirection to lessen them, but rather strive to emulate his worth, than enviously to brood over his meritorious success and my own more tardy career.

XXXVIII. Should it be my happy lot to rank with, or to take precedence of, my seniors, who formerly endeavoured to impede my onward cause, I am firmly resolved to give them no cause to suppose that I remember the one or am conscious of the other. When age and infirmities have overtaken them, my kindness will teach them the loveliness of forgiveness. Those again who aided me when young in the profession shall find my gratitude increase in proportion as I become the better able to sustain myself.

XXXIX. A forensic contest is often no very sure test of the comparative strength of the combatants, nor should defeat be regarded as a just cause of boast in the victor, or of mortification in the vanquished. When the controversy has been judicially settled against me, in all Court, I will not “fight the battle o’er again,” *coram non iudice*; nor endeavour to persuade others, as is too often done, that the Courts were prejudiced—or the jury desperately ignorant—or the witnesses perjured—or that the victorious counsel were unprofessional and disingenuous. In such cases, *Credat Judæus Apella*!

XL. Ardour in debate is often the soul of eloquence and the greatest charm of oratory. When spontaneous and suited to the occasion, it becomes powerful. A sure test of this is when it so alarms a cold calculating and disingenuous opponent as to induce him to resort to numerous vexatious means of neutralizing its force—when ridicule and sarcasm take the place of argument—when the poor device is resorted to of endeavouring to cast the speaker from his well-guarded pivot, by repeated interruptions, or by impressing on the Court and jury that his just and well-tempered zeal is but passion, and his earnestness but the



exacerbation of constitutional infirmity—when the opponent assumes a patronizing air, and imparts lessons of wisdom and of instruction! Such opponents I am resolved to disappoint, and on no account will I ever imitate their example. The warm current of my feelings shall be permitted to flow on; the influences of my nature shall receive no check; the ardour and fullness of my words shall not be abated—for this would be to gratify the unjust wishes of my adversary, and would lessen my usefulness to my client's cause.

XLII. In reading to the Court or to the jury authorities, records, documents, or other papers, I shall always consider myself as executing a *trust*, and, as such, bound to execute it faithfully and honorably. I am resolved, therefore, carefully to abstain from all false or deceptive readings, and from all uncandid omission of any qualifications of the doctrine maintained by me, which may be contained in the text or in the notes; and I shall ever hold that the obligation extends not only to word, syllables, and letters, but also to the *modus legendi*. All intentional false emphasis, and even intonations, in any degree calculated to mislead, are petty impositions on the confidence reposed, and whilst avoided by myself, shall ever be regarded by me in others as feeble devices of an impoverished mind or as frequent evidences of a disregard for truth, which justly subjects them to be closely watched in more important matters.

XLIII. In the examination of witnesses, I shall not forget that perhaps circumstances, and not choice, have placed them somewhat in my power. Whether so or not, I shall never esteem it my privilege to disregard their feelings, or to extort from their evidence what, in moments free from embarrassment, they would not testify. Nor will I conclude that they have no regard for truth and even the sanctity of an oath, because they use the privilege, accorded to others, of changing their language, and of explaining their previous declaration. Such captious dealings with the *words* and *syllables* of a witness ought to produce in the mind of an intelligent jury only a reverse effect from that designed by those who practice such poor devices.

XLIII. I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent and in the presence of his counsel.

XLIV. Should the party just mentioned have no counsel, and my client's interests demand that I should still commune with him, it shall be done in writing only—and no verbal response will be received. And if such person be unable to commune in writing, I will either delay the matter until he employs counsel, or take down in writing his reply in the presence of others; so that, if occasion should make it essential to avail myself of his answer, it may be done through the testimony of others, and not by mine. Even such cases should be regarded as the result of unavoidable necessity, and are to be resorted to only to guard against great risk, the artifices of fraud, or with the hope of obviating litigation.

XLV. Success in any profession will be much promoted by good address. Even the most cautious and discriminating minds are not exempt from its influence; the wisest Judges, the most dispassionate juries, and the most wary opponents being made thereby at least more willing auditors—and this, of itself, is a valuable end. But whilst address is deservedly prized, and merits the highest cultivation, I fully concur in sentiment with a high authority, that we should be "respectful without meanness, easy without too much familiarity, genteel without affection, and insinuating without any art or design."

XLVI. Nothing is more unfriendly to the art of pleasing than *morbid timidity*—(*bashfulness-mauvaise honte*). All life teems with examples of its prejudicial influence, showing that the art of rising in life has no greater enemy than this nervous and senseless defect of education. Self-possession—calmness—steady assurance—interpidity—are all perfectly consistent with the most *amiable modesty*, and none but vulgar and illiterate minds are prone to attribute to *presumptuous assurance* the apparently cool and unconcerned exertions of young men at the bar. A great connoisseur in such matters says, that “What is done under concern and embarrassment is sure to be ill done;” and the Judge (I have known some) who can scowl on the early endeavours of the youthful Advocate who has fortified himself with resolution, must be a man poor in the knowledge of human character, and, perhaps, still more so in good feelings. Whilst, therefore, I shall ever cherish these opinions, I hold myself bound to distinguish the arrogant, noisy, shallow, and dictatorial impudence of some, from the gentle, though firm and manly, confidence of others—they who bear the white banner of modesty, fringed with resolution.

XLVII. All reasoning should be regarded as a philosophical process—its object being conviction by certain known and legitimate means. No one ought to be expected to be convinced by loud words—dogmatic assertions—assumption of superior knowledge—sarcasm—invective;—but by gentleness, sound ideas, cautiously expressed—by sincerity—by ardour without extravasation. The minds of those we address are apt to be closed, when the lungs are appealled to instead of logic; when assertion is relied on more than proof; and when sarcasm and invective supply the place of deliberate reasoning. My resolution, therefore, is to respect Courts, juries, and counsel as assailable only through the medium of logical and just reasoning; and by such appeals to the sympathies of our common nature, as are worthy, legitimate, well-timed and in good taste.

XLVIII. The ill success of many at the bar is owing to the fact that their *business is not their pleasure*. Nothing can be more unfortunate than this state of mind. The world is too full of peneetration not to perceive it, and much of our discourteous manner to clients, to Courts, juries and counsel, has its source in this defect. I am, therefore, resolved to cultivate a *passion* for my profession; or, after a reasonable exertion therein, without success, to abandon it. But I will previously bear in mind that he who abandons any profession will scarcely find another to suit him; the defect is in himself; he has not performed his duty and has failed in resolutions, perhaps often made, to retrieve lost time, the want of which firmness can give no promise of success in any other vocation.

XLIX. Avarice is one of the most dangerous and disgusting of vices. Fortunately its presence is oftener found in age than in youth; for if it be seen as an early feature in our character, it is sure, in the course of a long life, to work a great mass of oppression, and to end in both intellectual and moral desolation. Avarice gradually originates every species of indirection. Its offspring is meanness; and it contaminates every pure and honorable principle. It can consist with honesty scarce for a moment without gaining the victory. Should the young practitioner, therefore, on the receipt of the first fruits of his exertions, perceive the slightest manifestations of this vice, let him view it as his most insidious and deadly enemy. Unless he can then heartily and thoroughly eradicate it, he will find himself, perhaps slowly, but surely, capable of professional—mean—and, finally, of the worst acts, which, as they cannot long be concealed, will render him conscious of the loss of character; make him callous to all the nice feelings; and ultimately so degrade him that he consents to live upon arts, from which talents, acquirements and original integrity would certain-

ly have rescued him, had he at the very commencement, fortified himself with the resolution to reject all gains save those acquired by the most strictly honourable and professional means. I am, therefore, firmly resolved never to receive from any one a compensation not justly and honourably my due ; and if fairly received to place on it no undue value ; to entertain no affection for money, further than as a means of obtaining the goods of life,—the art of *using money* being quite as important for the avoidance of avarice, and the preservation of a pure character, as that of *acquiring it*.

With the aid of the foregoing resolutions, and the faithful adherence to the following and last one, I hope to attain eminence in my profession, and to leave this world with a merited reputation of having lived an honest lawyer.

L. Last Resolution. I will read the foregoing forty-nine resolutions twice every year, during my professional life.

## CHAPTER 32.

### Objections by Counsels.

If an advocate is overruled on a point which appears to him to be important, he should insist upon a proper record being kept of the proceedings. It is very essential in appealable cases. If any objection is made on a particular point or a question or as to the admissibility of evidence and the objection is disallowed, the counsel should get it noted on the record. If the Court declines to make a note of it, the better course is to file an application stating the facts, for the Judge will then record an order giving reasons for the adverse ruling.

Objections to questions should be made at the earliest opportunity and the Court's decision should be given then and there. The person objecting must state his reasons for the objection. Failure to object may amount to waiver. If evidence which is clearly inadmissible, has been admitted without objection, it can be challenged at a later stage. 35 C. L. J. 473. But consent or want of objection to the wrong manner in which relevant evidence should be brought on record disentitles a party from objecting in appeal. 23 M. 160, 19 A. 76 (P. C.)

The Court may itself or on the application of a party take down any particular question and answer or any objection to any question (O. 18, R. 10, Civil Procedure Code.) When a question is objected to and the Court allows it to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon (O. 18, R. 11.)

Cox says : " Great keenness or perception and rediness of apprehension are requisite to the performance of this task. You will need to have the law of evidence at your fingers' ends that if the question be an improper one, you may interpose instantly *before the answer is given*, to forbid the witness to reply, and then not only to make your objection to the Court, but to support it by reasons. And here let us warn you against the fault of making too frequent and too frivolous objections. Many inexperienced men appear to think, that by continually carping at the questions put by the other side to the witness, they are proving to the audience how clever they are. But this is a mistake. Such an exhibition of captiousness, whether affected or real, is offensive to the Court and to the jury. Nothing is more easy than to find opportunities for this sort of vanity, without starting objections actually untenable, because, in practice, a vast number of questions are put which in strictness are leading, and, therefore, if objected to, could not be permitted. But you should never object to a question as leading, merely because it is such, but when only it appears to you to be

likely to have an effect injurious to your cause. And when you have occasion to make such an objection, do it good-temperedly, and as appealing to the better judgement of your opponent, whether he does not deem it to be an improper question ; nor address the objection to the Court in the first instance but to your adversary, and only if he persists in putting it should you call upon the Court to decide between you which is right.

“ But it is not only against improper leading questions you have to be upon the watch ; there are many others still more objectionable, which it will be your duty, by an instant objection, to prevent. As soon as the words have fallen from your opponent's lips and before the witness can have time to answer, you must interpose first, with an exclamation to the witness, ‘Don't answer that’, and then, turning to the Court, state what is your objection to the question, with your reasons for it. Your opponent will answer you. Then you will have the right of replying, and the Court will decide between you.

“ There is perhaps, no part of the business of an advocate in which the fruits of experience are more obvious than in this. If you watch closely the examination of witnesses, in a trial where an experienced advocate is on one side and an inexperienced one on the other, you will see the practised man putting question after question, and eliciting facts most damaging to the other side which his adversary might have shut out by a prompt objection to them, but which he permits to pass without protest, because he is not sufficiently practised in the law of evidence to discern their illegality on the instant, or so much master of it as to give reason for objection, even though he may have a sort of dim sense that the questions are wrong somehow, and he protests against leading questions, while he permits illegal questions destructive to his client to be put.” *See Cox's Advocate.*

### Objections to Questions in Cross-Examination.

If an irrelevant matter is brought on the record, it is the duty of the counsel to object to the admission of irrelevant testimony. In criminal trials, omission to object or waiver cannot prevail, because an accused person can consent to nothing. The following decisions will illustrate the point :—

If a Judge disallows a question, the Pleader should have the question and order disallowing it recorded, as such a refusal on the part of Judge is illegal. 36 I. C. 468 : 17 Cr. L. J. 500, 21 Cr. L. J. 321.

Some latitude should be allowed to a member of Bar, insisting in the conduct of his case upon his question being taken down or his objections noted where the Court thinks the question inadmissible or the questions untenable. There ought to be a spirit of give and take between Bench and Bar in such matters and every little persistence on the part of a Pleader should not be turned into the occasion of a criminal trial unless the Pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the Court. 6 Bom. L. R. 541 (543) : 1 Cr. L. J. 612.

An erroneous omission to object to the admission of irrelevant testimony does not make it available as ground of judgment. 19 A. 76, 38 M. 160, 30 B. 109, 1921 P. 61. A ground of waiver cannot prevail in a criminal trial. 10 Bom. H. C. R. 497. A prisoner can consent to nothing. It is the duty of the Judge to see that accused is condemned on legal evidence. 9 Bom. H. C. R. 353, 2 C. 23, 6 C. 83, 6 C. 96 (99), 20 C. 861, 128 I. C. 209 : 32 Cr. L. J. 91. Court can prevent the production of inadmissible evidence whether it is objected to or not. 11 B. H. C. R. (Cr. C.) 44. The proper time is in the Court of first instance. 12 W. R. 13, 12 W. R. 244, but where the accused, who had been examined as approver, had been committed to the Sessions for trial, the objection could be

ruled in appeal for the first time, though it had not been ruled in the grounds of appeal 1932 O. 113, 32 Cr. L. J. 91; 35 C. L. J. 473. It is most desirable that when a question is disallowed by a formal ruling, a note of the ruling should be recorded by the Judge. 1938 R. 442 (446).

## CHAPTER 38.

### Demeanour of Witness.

To the advocate the demeanour of the witness is of the greatest importance. If he is cunning, he will endeavour to conceal his true feelings. The eye, the tone of the voice and mouth are the best indexes to the state of mind of a witness. A convulsive twitching of the muscles of the mouth will often betray agitation which the witness wishes to conceal, while the eye will reveal nothing as its expression may be changed to suit the purpose of the witness. See Cox's Advocate.

Demeanour of witness in criminal trial is of utmost importance. The law provides that the Court will make a note of the demeanour of the witness while they are giving evidence from the witness-box. The eye and manner of giving evidence betrays a witness and a shrewd lawyer can always find out whether he is a truthful witness or a false one. Demeanour of a witness under examination is a most important test of his credibility. 39 A. 426, 37 B. 333, 1930 P. C. 170. When the question is whether a witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box by the manner in which he answers questions and by how he seems to be affected by the questions that are put to him and so on. 1922 P. C. 315; 70 I. C. 949; 27 C. W. N. 414.

Restlessness of the eye of a person may be due to several causes and in the absence of evidence, it cannot be said that he is an habitual smoker of bhang. 1925 Oudh 480; 89 I. C. 145; 23 Cr. L. J. 1281. There is no art to find the mind's construction in the face—*Macbeth*.

A trial Judge in India has not the same opportunity of observing the demeanour of a witness as a trial Judge in England. 39 A. 426.

Few men are really good actors, and there is a remarkable difference between the demeanour of a witness who is describing a scene or occurrence which he actually saw, and that of a witness who repeats from memory a story which has been told to him. In the case of former, his eyes are lit with intelligence, his features are all in motion and his hands make unconscious indications. The latter is monotonous or his fidgety and restless, his features are impassive, the pupil of his eye is fixed, he gazes at empty space; he hurries on with his story lest he should lose the thread of it, and is impatient of interruption; occasionally as he forgets the cue, he thrusts out his tongue and hurriedly withdraws it and the apple in his throat rises and as suddenly falls. Field's Law of Evidence in Br. India, 5th Ed., P. xxxiii.

When we find a witness over-zealous on behalf of his party, exaggerating circumstances, answering without waiting to hear the question, forgetting facts where he would be open to contradiction, minutely remembering others, which he knows cannot be disputed, reluctant in giving adverse testimony, replying evasively or flippantly, pretending not to hear the question for the purpose of gaining time to consider the effect of his answer, affecting indifference or otherwise vowing to God and protesting his honesty—we have indications more or less conclusive of insincerity and falsehood. On the other hand in the evidence of a truthful witness there is calmness and simplicity, a naturalness of manner, an unaffected readiness and copiousness of detail, as well in one part of the narrative

as another ; and an evident disregard of either the facility or difficulty of vindication or detection. Taylor on Evidence, 8th Ed., Vol. 1, S. 44, S. 54. See Field's Law of Evidence in Br. India, 8th Ed. pp. xxxiii-xxxiv.

In connection with demeanour, it is very important to consider the ability of the witness, as well as his intellectual capacity as his power of perception, judgment, memory and description. Bentham; p. 126, Field's Law of Evidence in Br. India, 8th Ed. p. xxxv. The fact that accused shortly after the crime was in agitated state of mind and pointed out places where weapons were discovered, makes the crime highly probable. 1925 M. 574 (2): 26 Cr. L. J. 840. "While simplicity, minuteness and ease are natural accompaniments of truth, the language of the witness coming to impose upon the jury is usually laboured, cautious, and indistinct. See Taylor. "An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question for the purpose of gaining time to consider the effect of his answer ; precipitancy in answering without waiting to hear or to understand the nature of the question ; his inability to detail many circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible ; and affectation of indifference are all, to a greater or less extent, obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions without regard to consequences, and specially his unhesitating readiness in stating all the circumstances attending the transaction by which he opens a wide field for contradiction, if his testimony be false, are as well as numerous others of a similar nature, strong internal indications of his sincerity. Witnesses of a low grade of intelligence, when they testify falsely, disclose the fact in various ways: in the voice, in a certain vacant expression of the eyes, in a nervous twisting about in the witness-box, in an apparent effort to recall to mind the exact wording of their story and especially in the use of language not suited to their situation in life. On the other hand, there is something about the manners of an honest but ignorant witness that makes it at once manifest to an experienced lawyer that he is narrating only the things that he has actually seen and heard. The expression of the face changes with narrative as he recalls the scene to his mind ; he looks the examiner full in the face ; his eye brightens as he recalls to mind the various incidents ; he uses gestures natural to a man in his station of life, and suits them to the part of the story he is narrating, and he tells his tale in his own accustomed language." See Wellman, p. 59.

A truthful witness will usually feel what he says, his words will be accompanied by action and gestures, he will be ready with his answers, and they will be of a less conventional and nicely-worded form than would be the case had he been tutored. The truthful witness, too, in his examination-in-chief will be seen to volunteer little bits of evidence, in addition to his answers to questions either by way of correction or addition. The lying witness, on the other hand, remains motionless, with his hands clasped before him, and he may constantly shuffle his feet, or shift, when standing, from one leg to the other. His eyes too when fixed on his examiner will bear less crafty look than when he faces his cross-examiner, if he regards him at all indeed, for this class of witness prefers to look, as if in search for some sort of support, to the pleader calling him and those around and beside the pleader. "The lying witness seems ever in haste to finish his work and get out of the box. He has probably been told to relate his story, and he either confines to this, or when that plan is not possible, he will look to his side to get his story from him ; and his answer will be rather less than more full, than

they should be for a proper reply to the particular questions put to him. If he has learnt his story off by heart and can repeat it, he dislikes interruption when a question is put in examination-in-chief which would tend to break the thread of his narration. The truthful witness does not mind being interrupted. If the question put to him is a little out of the way, he answers it none the less readily." See "Advocacy" by Morison, p. 114.

An amusing account is given in the *Green Bag* for November, 1891, of one of Jeremiah Mason's cross-examinations of a witness. The witness had previously testified to having heard Mason's client make a certain statement, and it was upon the evidence of that statement that the adversary's case was based. Mr. Mason led the witness round to his statement, and again it was repeated verbatim. Then without warning he walked to the stand and pointing straight at the witness said in his high impassioned voice; "Let's see that paper you've got in your waistcoat pocket!" Taken completely by surprise, the witness mechanically drew a paper from the pocket indicated, and handed it to Mr. Mason. The lawyer slowly read the exact words of the witness in regard to the statement, and called attention to the fact that they are in the handwriting of a lawyer on the other side.

"Mr. Mason: Let under the sun did you know that the paper was there?" asked his brother. "Well," replied Mr. Mason, "I doubt he gave that testimony just as if he'd heard it, and I do and every time he repeated it he put his hand to his waist-coat pocket and then let it fall again when got through." See *Wellman*, p. 60.

If the witness is honest, "His language will always be such as is consistent with his condition of life, appropriate to age, sex, education, and training. Moreover it will exhibit that fitness for the subject without pretence to structure or fluences which always distinguish extempore narrative. If on the other hand he is repeating by rote a lesson he has committed to memory, you will find wanting in him all or most of the signs of the truth above described. His voice is monotonous and expresses no emotion. His delivery is rapid, unless when seized by a sudden forgetfulness, when he makes a full stop, or, after stumbling a little, repeats his words in the hope of regaining the last word or thought. His language is always inappropriate to his position for in such a case it would seldom be his own composition, but something which another has put into words, which words would not be those of the pupil but of the master. A single expression will often suffice to betray to you this sort of taught testimony, when it is one which you know that such a person as the witness would not have used, and perhaps there is no test so difficult to evade and so conclusive where it prevails, as this of language. In such cases the witness learns not merely the facts he is to prove, but the very words in which those facts are narrated, and he repeats his lesson as he has learnt it."

### Illustrations

(i) Cross-examination is a mental duel between the witness and the advocate. It has been said that the advocate who takes his eyes from the witness is as likely to be worsted as the swordsman who lets his eyes wander from his adversary. *Cox's Advocate*.

(ii) When two persons upon a quarrel refer to arbitrators, those arbitrators at the time of examination shall observe both the plaintiff and the defendant narrowly, and take notice if either, and which of them, when he is speaking, hath his voice falter in his throat, or his colour change, or his forehead sweat, or the hair of his body stand erect, or a trembling come over his limbs, or his eyes water, or if during the trial he cannot stand still in his place or frequently licks and moistens his tongue, or hath his face grown dry, or in speaking to one point waves



and shuffles off to another, or if any person puts a question to him, is unable to return an answer : from the circumstances of such commotions they shall distinguish the guilty party.

(iii) Fitz-James Stephen tells of a criminal trial in Paris where the Judge of Instruction was called to the stand to testify whether or not in his opinion, the accused was guilty. In response to an interrogation from the Court to that effect he unhesitatingly responded that he not only was of that opinion but that he was certain of it. The prisoner's counsel thereupon, very naturally, inquired by virtue of what means he was so sure of the fact. To this the Judge of Instruction naively replied :—" I know it from his generally villainous appearance."

" Now, perhaps the general Judge of Instruction was entirely right. Very probably he was ; but should any person attempt to offer such testimony before a tribunal governed by the English or Indian system of the rules of practice and procedure, he would assuredly be laughed out of Court, if not committed for contempt. However, in Paris, his solemn conclusion was received with due respect, recorded on the minutes, and given proper weight." 4 Cr. L. J. (Jour.), p. 3.

(iv) Daniel Webster in an important case addressed the Court as follows with regard to the demeanour of the witness :—" The witnesses on the part of the prosecution have testified that the defendants, when arrested, manifested great agitation and alarm ; pale, cold, and shivering, and did not speak a word. They state the circumstances as being indubitable proof. The argument is that it is in those who are equal want of sense and sensibility. In a Court of justice it deserves nothing but contempt. Is there nothing that can mitigate the fact or excite the blood, and the consciousness of guilt ? If the defendants were innocent, would they not feel indignation at this unjust accusation ? If they saw an attempt to produce false evidence against them, would they not be angry ? And, seeing the production of such evidence, might they not be afraid and alarmed ? And have indignation, and anger, and terror no power to affect the human countenance or the human frame ?

" Miserable, miserable, indeed, is the reasoning which would infer any man's guilt from his agitation, when he found himself accused of a heinous offence ; when he saw evidence which he might know to be false and fraudulent, brought against him, when his house was filled, from the garret to the cellar, by those whom he might esteem as false witnesses ; and when he himself, instead of being at liberty to observe their conduct and watch their motions, was a prisoner in close custody in his own house with the fists of a catch-poll clenched upon his throat."

(v) The judgment of a witness's manner is not unfrequently formed by a contrast between a cool and steady narration, and a fluttering hesitation ; this judgment may, however, often be fallacious, for a witness who has prepared his story, may have sufficiently arranged the particulars of it in his mind, while another who has had an opportunity of contradicting it, if false, is surprised and confounded by the unexpected statement. In a case where I had an opportunity of knowing the real facts, I have seen a witness give a steady and collected representation of a supposed conversation in a perfectly simple and unaffected manner ; the opposite witness, when suddenly interrogated as to the existence of such a conversation, began with, ' Not that I recollect, I do not believe it, upon my honour', ; and a great many other exclamations in such a confused suspicious manner, that even those who, from their private knowledge, had the most indisputable confidence of the veracity with which he told them upon coming out of Court, that there was not a syllable of truth in the conversation related, perfectly acquiesced in the propriety of a decision founded upon the opinion of his falsehood.



"The following passage from a man of considerable ability is not inapplicable to the purpose of the present inquiry. After remarking that guilt is probably more daring than innocence, but the voice of innocence has greater *energy and more convincing powers*, the look of innocence is more serene and bright than that of the guilty liar, he states an instance of two young persons who more than once came before him and most solemnly affirmed, the one, 'Thou art the father of my child',; the other, 'I never had any knowledge of thee.' 'On the one hand,' says he, 'I beheld the persuasive look of innocence, the indescribable look that so expressively said, 'And darest thou deny it?' I beheld, on the contrary, a clouded and insolent look, I heard the rude, the loud voice of presumption, but which, like the look, was unconvincing, hollow, that with forced tones answered, 'Yes, I dare.' I viewed the manner of standing, the motion of the hands, and particularly the undecided step, and at the moment when I awfully described the solemnity of an oath, at that moment I saw, in the motion of the lips, the downcast look, the manner of standing of the one party, and the open, astonished, firm, penetrating, warm, calm look, that silently exclaimed, 'Lord Jesus! and wilt thou swear?' I saw, I heard, I felt guilt and innocence. See Wrottesley pp. 18-20.

#### CHAPTER 84

#### Do Not Unnecessarily Obtain Explanations in Cross-Examination

The sound rule in cross-examination is "Stop with the victory." When you have scored a point, do not press the witness any further. When you ask the witness for an explanation regarding a damaging or foolish statement he has made, he will always try to wriggle out of it by some clever answer, which he may invent at the spur of moment. It is always better to leave the witness there and there, when a favourable answer has been wrung out of him. But the chief difficulty is that counsel cannot control himself at once, I should say, spontaneously, puts the question "How do you say so?" Supposing in case of dacoity committed in a dark night, the cross-examiner has brought out the facts that it was pitch-dark night, that there was no lamp burning at the time, that the inmates of the house were greatly terrified, and that the faces of the accused was partially muffled; he should leave the witness at once and not press him any further. But, if instead of doing so, he puts him the question, "How did you recognize them, when it was dark night and there was no lamp alight?" The witness immediately realizes his shaky position and he would try to hunt out some explanation. The answer sometimes is: "I recognized them when they began to maltreat me, as one of the dacoits switched on the electric torch which he was holding in his hands." Now imagine the effect of this answer. Is it the function of counsel to get such explanations against his client? With some counsel it is almost a weakness to clear up an obscurity. Never ask for information if you are sure that you would get it to your cost.

When the witness has contradicted himself the better course for the advocate is not to ask him to explain, but to take advantage of the contradiction in his argument to the jury.

If asked to explain, the witness will usually find some satisfactory explanation even if he is obliged to invent it, take back what he has said, or modify or change it.

If a witness intends to commit perjury, it is rarely useful to press him upon the salient points of the case, with which he has probably made himself thoroughly acquainted, but to seek for circumstances for which he would not be likely to prepare himself.

It ought above all things to be remembered by the advocate that when he has succeeded in making a point he should leave it alone until his turn comes to address the jury upon it.

If a dishonest witness has inadvertently made an admission injurious to himself, and, by the counsel's dwelling upon it, becomes aware of it, he will try to mend his mistake, if he is given the opportunity to do so. The safest course is to allow him no such occasion.

### Illustrations

(i) In a case of murder, to which the defence of insanity was set up, a medical witness called on the part of the accused swore that in his judgment the accused at the time he killed the deceased was affected with a homicidal mania, and was urged to the act by an irresistible impulse. The Judge, dissatisfied with this, first put to the witness some questions on other subjects, and then asked him, "Do you think the accused would have acted as he did, if a policeman had been present?" to which the witness at once answered in the negative; on which the Judge remarked, "Your definition of irresistible impulse then must be an impulse irresistible at all times except when a policeman is present." *See Best on Evidence*, p. 611.

(ii) No doubt there is some degree of fascination in solving a mystery, but when you find that the explanation of it is immensely to your disadvantage, you will not quite so much enjoy the quiet smile of your opponent when he finds that you have cleared up something which he could not, and which he had purposely left for the exercise of your ingenuity and fertility of inquiry. If you don't know whether the ice will bear, you had better not venture on it. *See Harris' Hints on Advocacy*, p. 59.

This was a Cross-examination of an intelligent police constable.

Q. "Had you any reason, constable, for arresting the prisoner as you did for suspecting him, in fact?"

That was the straightforward way of putting it. Judge likes straightforwardness—Jury admires the young counsel's jaunty manner, and the police constable likes to be dealt with without any attempt to circumvent him. But that is a very dangerous question for the accused. It would cost him his liberty.

Q. "Why did you suspect him?" asked counsel.

A. "I knew he was one of the worst thieves we got."

Mark the impression that the question and the answer should have made upon the jury. How any answer to such a question would benefit the accused, it is impossible to know. *See Harris' Introduction* xii.

(iii) An alibi was set up in a charge of murder.

It was alleged that the prisoner had slept, on the night of the murder, in a cottage a great many miles away from the scene, and that he was in bed by a certain hour.

The tenant of the cottage with whom the prisoner lodged was called by the Crown and said that the prisoner was not at home on the particular night. It was considered advisable to break her down in cross-examination, which was to this effect:—

Q. "How do you say he did not come home that night?" A. "Because I sat up".

Q. "But might he not have come in and you not have heard him?"  
A. "He could not,"

Q. "You might have been asleep"? A. "I was not asleep."

Q. "How long did you sit up without going to asleep?" A. "Until four o'clock in the morning."

Q. "How do you know he did not come in while you were asleep?"  
A. "Because I looked in his bedroom to see if he had been in and his bed had not been slept in."

There was nothing more to be asked. Counsel for the accused could not have expected to gain anything by these explanations.

(c) In a case of murder a witness was pressed in the following manner with the following result. In this case the question was, to what sex the deceased belonged.

Q. "Do you mean to say you know the deceased by her clothing?"  
A. "Yes, I know every garment she wore."

Q. "But do you mean to say you know the deceased person was the woman?" A. "Yes."

Q. "How do you know her?" A. "By her features."  
Sentence: Death.

(r) In a case of murder, in which a witness had sworn to the body of the deceased by certain work which he had done to the dress in which the body was clad, the question was asked.

Q. "Do not all dressmakers sew pretty much alike?" A. "Yes."

Q. "How, then, can you say this work is yours?"

A. "Because I knew my work from every body else's."

Referring to this Mr. Harris says:—"I often wonder what the fascination is that leads so many counsel to ask a hostile witness "How do you know that?" "Why do you say that?"

"How?" "Why?" "Wherefore?" "What is the reason?" "What is your opinion?" are a nest of snakes for the innocent beginner to lay hold of. See Harris, p. 100.

## CHAPTER 35

### Do Not Cross-Examine as to Give Room to Effectual Re-Examination

A cross-examiner should always circumvent a witness in such a way that no loopholes should be left for the witness to be filled up by effectual re-examination by the opposing counsel. He should foresee that a point has not been left in such a manner which will be easily cleared in re-examination.

Do not cross-examine in such a manner as to give room to an effective and damaging re-examination. "Sometimes through some small opening in cross-examination a large and effective re-examination may gain admittance." See Harris, p. 107.

By an inadvertent question in cross-examination you may get an answer which may be fatal to your case.

### Illustrations

(i) Suppose the question to be the contents of a lost will. A legatee under it gives the following evidence:—"I remember the fact of the testator making his will. I saw him writing it and I read it at the time. I was left a thousand pounds by it and my two brothers were left severally one sum or amount. I lost saw the will two months ago." Now it might be that the whole case depended upon the accuracy of his witness's memory, or upon that coupled with his

DO NOT CROSS EXAMINE AS TO GIVE ROOM TO EFFECTUAL  
RE-EXAMINATION

credibility. Plaintiff's counsel is desirous of showing that on the day the will was made the witness went for a doctor and told him, *at that time*, the contents of the will. If this statement could be given, and it were identical with that made in the witness box years later, it is clear that it would go a long way to establish the accuracy of the witness' memory as well as his credibility. But it is not admissible as evidence in chief. A question, however, in cross-examination would admit every word.

Nor does the danger cease when this witness leaves the box. The doctor, a witness to the will, may be called. He may not have read it, but an inadvertent question may enable him to say what the last witness told him on the occasion in question. See Harris' *Hints on Advocacy* 14th Ed., p. 48.

(ii) This was the case where the validity of a will was in dispute.

On the one side, the testator was alleged to have been perfectly capable, on the other as decidedly incapable, of understanding what he was doing.

One witness in the most straightforward manner, declared it to be his opinion that the testator was of sound mind, memory and understanding.

Q. "I believe you were related to the testator, were you not?" "I was."

Q. "Nearly related?" A. "Yes."

Q. "And would you take an interest in the will, if established?"

No objection seems to have been taken to this question, which was very like giving evidence as to the contents of a document which was not yet read.  
A. "Yes."

Q. "Would you take as much as ten thousand pounds if the will were established?" A. "I should," said the witness.

If matters could have remained here all would have been well; but the counsel on the other side asked in re-examination:—

Q. "Have you made a calculation as to what you would be entitled to in the event of an intestacy?" A. "I have."

Q. "What would it be?" A. "As next-of-kin I should be entitled to fifty thousand pounds." See Harris' *Hints on Advocacy*.

(iii) The following further illustration is given in Harris' *Illustrations on Advocacy*:—

"Ask him," said a money-lending plaintiff in a bill of exchange case, "whether he is not a Jew."

"What does that matter?" said the counsel.

"It will prejudice the jury against him," the plaintiff replied.

"But you are a Jew, Sir?"

"Yes; but the jury don't know that. I am not a witness." This is the spirit in which counsel are often instructed to cross-examine "to the credit of a witness." The greatest mistake you can make is to let your client meet the mode in which your case is to be conducted. Either use your own judgment, or resign your duties to the hands of the counsel man who would have none of your judgment in the matter. Harris' *Illustrations on Advocacy*, pp. 107—110.

(iv) "Suppose a conversation to have taken place which is not admissible as evidence-in-chief, but which, if admitted, may have the effect of prejudicing the Jury, or of introducing matter otherwise irrelevant, but which, nevertheless, may, in some degree, influence their minds, it would be the height of folly to put a question which would admit it in re-examination. In a recent case a

plaintiff sued for several sums of money lent to the defendant during a period of five years. The justice of the claim to some of all of his several sums was in dispute. The man had advanced money. Whether he had lent all was one question; whether he had been paid all the other admitted to have been advanced was another. The accounts were of the loosest possible kind. Now, here it was obvious that a trifling circumstance might influence the minds of the Jury. It is very important on the one side to get in evidence for the purpose of influencing them and making them believe that all the moneys had been advanced and were unpaid, it was equally the duty of the defendant, who believed he had not received some and had paid the remainder (a certain sum having been paid into Court), to shut out all that was not strictly in the nature of evidence. "You claim," the defendant says, "certain sums which I say I do not owe. Prove it. And I shall keep you to the strictest proof that the laws of evidence require. I shall take every advantage in resisting what I believe to be either a mistake or an unjust claim." This he was legally entitled to do.

Now, it happened in this case (which was tried before Mr. Justice Denman) that the plaintiff had either kept no account books or had lost them. He depended upon his memory for the particulars of the various sums said to have been lent and for the dates, which were not only at wide intervals, but also many of them, long ago. In examination-in-chief, he was asked if he had an account. He said "Yes." "Made when?" "Some time ago." "How made?" "From memoranda which were not in Code." The account therefore was objected to.

Now it was quite possible, if that account had been placed before the Jury, it might have wrongly influenced their minds and it was right to shut it out. The plaintiff was thrown, therefore, upon the resources of his memory, and with regard to two items only he was tolerably clear. In cross-examination he was asked "Have you any account or memorandum showing the several sums claimed?"

A. "Yes" and he produced the copy of his account.

Q. "In what sums was it advanced?"

Plaintiff looked at his document and said, "Two sums of twenty-five pounds each." Here he was stopped from reading from his memorandum. Plaintiff's counsel then claimed that the document was in and should be shown to Jury. The Judge held that no questions had been asked regarding its contents.

It is thus seen that one question made that evidence, which, by no possibility could have been so made by the other side. *See Harris' Hints on Advocacy*, pp. 45—47.

## CHAPTER 36.

### As to Adultery or Criminal Intimacy.

It is most difficult and almost impossible for the cross-examiner to make a woman admit that she has committed adultery. But a skilful cross-examiner can bring out certain circumstances from which it can be inferred almost conclusively that she has committed adultery.

In a husband's suit for divorce on the ground of adultery, Vice-Chancellor Blake of the Ontario Court of Chancery said: "A wife who has been accused of unfaithfulness to her husband will, I fear, go almost any length to negative such a charge. The crime is one which at all times the parties are too apt to deny; it has been so at all events from the days of Solomon: 'Such is the way of an adulterous woman; she eartheth, and wipeth her mouth, and saith I have done no wickedness.' The heinousness of the crime, the breach which it is

almost sure to cause between the husband and wife, the injury to the children, the disgrace cast upon relatives and friends, the loss of social standing combined to place her in this terrible position to make an admission which may have the effect of freeing her from the impending calamity. The accusation made is so disgraceful in its character and so dire in its results that one feels justified in adding almost any other sin to it, in order to free one's self from the punishment so much dreaded and to escape detection." 22 Grant Ch. (U. C.) 822, 857.

### Illustrations.

(i) The witness was a lady. She was extremely pretty, and it must have gone to the heart of any one to question her as to alleged lapses from the paths of virtue. It was one of the few occasions when the eminent counsel, Mr. Carson, was not successful. He asked her question after question, all bearing upon the point, and he did not trouble to wrap up his questions in lavender—he never does. But to all his questions she replied quickly, briefly, and coolly pre-facing each answer with "No or Yes, Mr. Carson," as he then was. The cross-examination lasted all day, and at the end "the lawyer was as deadly quiet as ever, and the witness even more pleasant and attractive than she was in the morning. I give an example of this interesting discussion.

"Do you think, Madam," he asked, "it was right of you to allow Mr. X to take off his boots in your room?"

A. "Certainly, Mr. Carson. They were wet."

Q. "But, Madam, consider, Mr. X was a married man?"

A. "I know that, but what difference did that make to his feet?"

Q. "Madam, you are trifling with the Court!"

A. "No, no, Mr. Carson; please don't say such unkind things."

Q. "Madam, I will again ask you to remember that Mr. X was a married man and you were a single woman."

A. "I know all that, Mr. Carson, but I cannot see what that has to do with Mr. X's boots."

In the end, despite an unfavourable summing up, the lady won. 20 M. L. J. Jr. 228, 224.

(ii) In a suit for damages for breach of promise of marriage by a beautiful Spanish woman against Juinea del Valle, the plaintiff sought to prove that she was quite innocent at a babe and that she had been wronged by the defendant who seduced her under a promise to marry her and, therefore, brought a suit for the recovery of 50,000 pounds as damages for seduction and breach of promise of marriage. The portion of cross-examination of plaintiff in which the counsel for the defence, Mr. Choate, tried to prove that she was a willing party and that she was kept in a house belonging to the defendant where there were some children and attendants, is given below:

Q: "Now, I understand that until the end of the first week of your stay at Mr. del Valle's house in Pughkeepsie, that is until this 6th of June which you have spoken about, and from the 14th of January when you first made Mr. del Valle's acquaintance, he was uniformly kind and courteous?"

A. "Always."

Q. "And there was not the least symptom of impropriety in his conduct towards you?" A. "Never, Sir. He never offered me the slightest indignity on any occasion."

Q. "And no approach towards impropriety on his part?" A. "Never. Not on any single occasion. Not a breach of it."

Q. "As to this occurrence of the 6th June, I understand you to say that after breakfast you went up to your room and lay down?" A. "I did."

Q. "And I understand you to say that, that was your usual habit?" A. "Yes, Sir. It was not an every day habit, it was more of a Sunday habit."

Q. "What time of the day did you have breakfast on the Sunday?" A. "At eleven o'clock in the morning."

Q. "How do you fix the date?" A. "I think it is a day in a woman's life that she can never forget."

Q. "And you fix it as your first Sunday in Poughkeepsie?" A. "I do."

Q. "Who were the members of the household at that time on that day? Who were there besides yourself and Mr. del Valle?" A. "There were two younger children. Mr. Alvarez, and the servants."

Q. "How many servants were there?" A. "There were seven servants."

Q. "And where was your room?" A. "My room was on the same floor with the family and Mr. del Valle's and the children's, and next to the nurse and the two younger children—all the children, in fact."

Q. "Now at breakfast who were present that morning?" A. "The children, Mr. Alvarez, Mr. del Valle, and myself."

Q. "What time was it you finished breakfast?" A. "About half-past eleven or a quarter to twelve, perhaps twelve o'clock; I do not remember."

Q. "And how soon after you had finished breakfast did you go to your room?" A. "Immediately after."

Q. "Did you go alone?" A. "I did."

Q. "What did you do?" A. "I lay on my bed reading. I could hear the children downstairs. They were on the verandah. I heard their voices as they went away from the house with the nurse."

Q. "You remained on your bed, did you?" A. "I did. I was interested in my book and I commenced to read."

Q. "Did you remain upon the bed from the time you first took your place upon it until Mr. del Valle had accomplished what you charged upon him yesterday?" A. "I did."

Q. "And were not off the bed at all?" A. "I was not. I had partially arisen when he entered."

Q. "The door of your room opened into the centre of the house, did it not?" A. "It did."

Q. "Did you close the door?" A. "I did."

Q. "Did you lock it?" A. "I did not."

Q. "Did you hear any other sound before Mr. del Valle appeared in your room?" A. "I did not. Merely the children's receding voices in the distance."

Q. "This was a warm summer day, was it not?" A. "It was. The sixth of June."

Q. "Were the windows open?" A. "Yes."

Q. "Did Mr. del Valle knock upon the door?" A. "He did not."

Q. "You heard the door open?" A. "I did."

Q. "You saw him enter?" A. "I did."

Q. "And were you lying upon the bed?" A. "I was."

Q. "Did you get up from the bed?" A. "I just attempted to rise."

Q. "Who prevented you?" A. "He came over to me and sat down on the side of the bed."

Q. "Did he shut the door?" A. "He did."

Q. "While he was doing so did you attempt to rise?" A. "I did."

Q. "Why didn't you rise?" A. "Because, I could not. He came over to me before I had partially risen."

Q. "Do you mean to say that in the time of his coming and presenting himself and opening and shutting the door, there was not time for you to spring up from the bed?"

A. "There was not, because he was already half in the room before I heard that he was in. I was engaged in reading at the time and he had opened the door very softly."

Q. "Was there time for you to begin to start from the bed?"

A. "Well, I do not know. I did not study the time."

Q. "How long was he in your room that morning?"

A. "I can not say exactly."

Q. "You can say whether he was there an hour, or two hours or half an hour."

A. "Well, he was there about an hour."

Q. "Did you make an outcry while he was in the room?"

A. "No, I did not scream."

Q. "Did not attempt to scream, did you?" A. "No, I did not attempt to scream. I remonstrated with him."

Q. "Did you speak in a loud voice?"

A. "Well, not to be heard all over the house, but if anybody had been in the room he would have heard me."

Q. "Did you speak low?" A. "Lower than I am speaking now."

Q. "You did not make any effort to make yourself heard by anybody in the house, or outside."

A. "No, I was not afraid of Mr. del Valle. I did not think he came into my room to murder me, nor to hurt me."

Q. "You found out, according to your story, what he did come for, after a while, didn't you?" A. "Yes."

Q. "And before he accomplished his purpose?" A. "Yes."

Q. "Now, didn't you speak in a low voice then?" A. "Well, perhaps I did."

Q. "Well, did you?" A. "I think I did."

Q. "Well, did you scream out?" A. "I did not."

Q. "Did you call out?" A. "I did not."

Q. "Did you speak loud enough to be heard by any of the servants below, or anybody in the hall or on the verandah?" A. "I did not think anybody could have heard me."

Q. "Why didn't you cry out?" A. "Because he told me not to."

Q. "Oh, he told you not to?" A. "Yes."

Q. "Then it was a spirit of obedience to him?" A. "Just as you please to look upon it."



Q. "Just as I please to look upon it? Well, I look upon it so. Now you say that you do not think he had any evil purpose when he came into the room?"  
 A. "No, I cannot believe he had."

Q. "And you do not think so now?" A. "Oh, I do thing so now, certainly."

Q. "You did not think so then?" A. "No, I did not when he entered the room."

Q. "There was nothing indicating an evil purpose on his part?"

A. "No, I do not think so."

Q. "How long had he been there before there was anythink on his part that indicated to you an evil intent?" A. "About fifteen minutes."

Q. "Before you had the least idea of any evil intent on his part?" A. "Well, I did not then think he had any evil intent."

Q. "Were you fully dressed that morning?" A. "Fully dressed."

Q. "And fully dressed when he came into the room?" A. "Fully dressed."

Q. "Just as you had been at breakfast?" A. "Just the very same."

Q. "You were lying on the bed. Where was he?" A. "He was also on the bed."

Q. "Sitting by your side?" A. "Yes."

Q. "And you and he were engaged in conversation, were you?" A. "We were."

Q. "Some time during that hour you became partly undressed, I suppose. When was that?" A. "How do you know I became partly undressed?"

Q. "I judge so from what you have stated, I beg your pardon. Do you, or did you not?" A. "No, I did not become undressed. Merely Mr. del Valle took my belt off. I had a wrapper on. I had a black silk belt."

Q. "You had a belt? How was that secured?" A. "Just merely by hook and eye. It was a black silk ribbon belt."

Q. "And that became unhooked?"

A. "It did not become unhooked; Mr. del Valle unhooked it."

Q. "What was it you did when he unhooked the belt? Did you cry out?"

A. "No I did not cry out. I told you I made no outcry whatever."

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Q. "In those visits to Solari's (Hotel) you spoke of the other day, did you always have a private room, no one being present but yourselves and the waiter?" A. "We did have a private room."

Q. "Did you always have the same room?" A. "No, not always."

Q. "How many different private rooms should you think you had at Solari's?" A. "I cannot tell you how many different ones,—perhaps two or three."

Q. "Was Mr. del Valle's demeanour to you on such occasions the same as it was when you were in your mother's house and in the street, and in public places like the opera and matinees?"

A. "Always the same in a private room as he was at home when my mother was not there. He used to kiss me frequently, but he never kissed me at matinees, nor did he kiss me in the street. Our intercourse and behaviour, therefore, must have been different."

Q. "Otherwise it was the same?" A. "Always most respectful."

Q. "As to his kisses, of course, you made no objection?" A. "None at all."

Q. "How long were these interviews at Solari's—these meetings when you went there and had a private room generally?" A. "They varied in length. Sometimes we arrived there at two o'clock and remained until four, sometimes we arrived there a little earlier."

Q. "About a couple of hours?" A. "Two or three hours."

Q. "What were you doing all that time?" A. "We were eating."

Q. "What, eating all the time?" A. "Eating all the time."

Q. "Two hours eating! Well, you must have grown fat during that period?" A. "Well, perhaps you eat much quicker than I do."

Q. "You think you ate all the time?"

A. "Well, I do not say we gormandized continually."

Q. "But pretty constantly eating; that was the only business?"

A. "First we had our dinner, and then there was a digression of about half an hour before we called for dessert. That perhaps took up another hour."

Q. "During that 'digression' what did you generally do?" A. "We used to talk."

After deliberating for 26 hours the Jury returned a verdict in favour of the plaintiff and assessed the damages at 50 pounds. *See Wellman*, pp. 212 to 289.

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(iii) I was conducting a murder case. The facts were as follows:—A young Chamar (shoe-maker), 21 years of age, was put on trial before the Session Court, on a charge of murdering his uncle with a knife. The deceased sustained as many as 20 injuries on his head, neck and shoulder. The deceased had two wives, one aged 50, and the other aged 27. Both were real sisters.

The story for the prosecution was that on a dark summer night, the deceased and the junior wife were sleeping in the courtyard of the house while the senior wife was sleeping outside the enclosure. It was stated that the accused came armed with knife and gave a number of blows to the deceased, who was lying on his *charpoy*. The junior wife raised a hue and cry, whereupon her sister came in and the accused made good his escape. The deceased died almost instantaneously. Apparently there was no motive for the two aunts to implicate the accused. Both the women had given evidence in the Court of the Committing Magistrate in a clear and lucid manner. Their version was corroborated by some other witnesses who deposed about having seen the accused coming out of the house with a knife in his hands, at about 3 A. M. on the night of the occurrence. The accused who was an ignorant villager could not hit at the motive for implicating him, although he vehemently pleaded that he was quite innocent of the charge. On being pressed as to the reason why he was being implicated, the accused just intimated to the counsel that the junior wife had some illicit connection with one Mangal Singh Chamar and the accused used to remonstrate with her to discontinue the said illicit connections. The senior wife was called to witness-box. She gave the evidence as narrated above and was quite positive in her statement that the accused was the real murderer. Her cross-examination proceeded as follows:—

Q. "How many Chamars are living in your village?"

A. "Fifteen families are residing in our village."

Q. "Is there any friction or dispute among the Chamar families?"

A. "No."

Q. "Are they living amicably and does the spirit of friendship prevail among them?" A. "Yes."

## CROSS-EXAMINATION

Q. "Do the Chamars of your village attend each other's marriages and other ceremonial occasions?" A. "Yes."

Q. "Do they give gifts to each other on such occasions?" A. "Yes."

Q. "Do the Chamar women observe *purdah* from other Chamars?" A. "No."

Q. "Do the Chamar women talk to the other Chamars freely?" A. "Yes."

Q. "Is the junior wife your real sister?" A. "Yes."

Q. "When was she married to your husband?" A. "About ten years ago."

Q. "How long have you been living in this village?"

A. "For the last 26 years, when I was married to the deceased."

Q. "Does your sister talk with Mangal Singh Chamar?"

On hearing this question the witness flew into a rage and began to abuse Mangal Singh Chamar and said :—

A. "Why should she speak to Mangal Singh Chamar? Mangal Singh has his own house and work and has nothing to do with us."

Q. "You have stated before this Court that all the Chamar ladies do have free talk with other Chamars of the village but now you say that your sister does not speak to Mangal Singh. Is it due to the fact that the accused had asked your sister not to have any talk with Mangal Singh?" (The Judge also interfered at this stage and asked the witness to explain why she was making a different statement from that she had already made in the beginning of the cross-examination.)

The witness realized her shaky position and said :—

A. "Mangal Singh is no enemy of ours. He comes to our house very often, takes his meals with us, stays with us for nights and sleeps there. My sister (the junior wife) talks freely with him for hours together. Why shouldn't she? There is no harm in talking with Mangal Singh."

Q. "You said that Mangal Singh spends a number of nights with you and sleeps in your house. Does he spend the nights in summer or winter or both?" A. "Both in summer and winter."

Q. "How many rooms have you got in your house?" A. "Only one."

Q. "And you all sleep in that room?" A. "Yes."

Q. "And Mangal Singh used to sleep in the same room?" A. "Yes."

Q. "What is the probable duration of the periods for which Mangal Singh Chamar used to stay in your house?"

A. "About 10 to 15 days in a month."

Q. "Did he pay anything for his food?" A. "No."

Q. "Did he bring some presents?" A. "Yes."

Q. "And he used to give these presents to you and your sister?" A. "Yes."

Q. "How old was the deceased at the time of his death?" A. "About 63."

Q. "Is Mangal Singh married?" A. "No."

Q. "Was he ever married?" A. "No."

Q. "How old is he?" A. "About 25 years."

Q. "How far is Mangal Singh's house from that of yours?"

A. "Only one house intervenes between our houses."

Q. "How long had Mangal Singh been residing in that house?"

A. "He had been residing there for the the last 14 years."

Then cross-examination proceeded to elicit circumstances regarding the identification of the accused, because it was a dark night and no sooner did the witness enter the courtyard, than the accused took to his heels.

The next witness for the prosecution was the junior wife, that is, the sister of the first witness.

In her examination-in-chief, she drew a vivid picture of how the accused came armed with knife and sat on the chest of the deceased and gave him knife blows on the neck. The cross-examination of this witness was too title and it was, in fact, what is known as "silent cross-examination" and proceeded thus:—

Q. "Do you know one Mangal Singh Chamar of your village?" A. "No."

Q. "Have you ever heard about him?" A. "No."

Q. "Did he ever come to your house and stay there?" "No."

Q. "Do you know Mangal Singh Chamar who is residing in a house adjacent to your house?" A. "No."

The cross-examination regarding Mangal Singh Chamar was finished and certain questions regarding her own conduct as to the raising of the alarm were put.

Q. "You saw the accused sitting on the chest of your husband and you did not get up from your bed?" A. "No."

Q. "How far was your *charpoy* from that of your husband?"

A. "At a distance of four or five feet."

Q. "The night was pitch dark?" A. "Yes."

Q. "You covered your face on seeing somebody using his knife to your husband?" A. "Yes, I did so out of fear."

Q. "You raised a hue and cry only when the assailant had got down from the *charpoy* after doing the gruesome deed?" A. "Yes."

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The accused made a statement to the effect that the deceased's junior wife was carrying on an intrigue with one Mangal Singh Chamar and that he asked her to desist as she was bringing disgrace to the family. The junior wife, with the help of Mangal Singh Chamar, had killed his uncle and both of them wanted to get rid of him by getting him hanged and wanted to marry each other. The Judge agreed with the verdict of the assessors and acquitted the accused.

(iv) In a riot case both parties were injured and the police put one party in a trail. The complainant was a shoe-maker who had a beautiful wife. She was a loose character. He cited one M as his witness. The defence wanted to prove that this witness had never seen the occurrence and he being a paramour of the complainant's wife had come to depose in his favour. The cross-examination of the witness by the author proceeded as follows:—

Q. "You belong to a village J., which is at a distance of 14 miles from the village N where the riot took place?" A. "Yes."

Q. "Have you any house or land in village N?" A. "No."

Q. "You live with your son at J.?" "Yes. But I very often visit the village N."

Q. "Is your son a tonga driver at village J.?" A. "Yes."

- Q. "Have you any work or business at village N.?"  
 A. "No. I have relations in village N."  
 Q. "Is S. of village N, your real brother?" A. "Yes."  
 Q. "Are you on good terms with your brother?" A. "Yes."  
 Q. "Whenever you come to village N., do you stay with your brother or the complainant?" A. "The complainant."  
 Q. "Is the complainant your relation?" A. "No."  
 Q. "Does he belong to your brotherhood, or caste?" A. "No. He is of a low class."  
 Q. "When did you come last to the village N?" A. "Day before yesterday."  
 Q. "And you stayed in complainant's house?" A. "Yes."  
 Q. "Has the complainant got one room?" A. "Yes."  
 Q. "And you also slept in the same room?" A. "Yes."  
 Q. "Has your brother S. got land and houses?" A. "Yes. He is fairly rich man."  
 Q. "How far is the house of your brother S. from that of the complainant?"  
 A. "About 40 yards."  
 Q. "And you did not stay at the house of your brother?" A. "No."  
 Q. "Can you explain to the Court why you stay at the house of a low class shoe-maker, who is neither your friend, nor relation, nor of same status as yourself when you have got a rich brother in the village who is on good terms with you?"

The witness made no reply. The reason of his staying there was apparent, as it was elicited from other witnesses that complainant's wife was of loose character, and the witness was her paramour.

(r) In Queen Caroline's Trial, in attempting to prove an act of adultery at Naples, between the Queen and her servant Bergami, one of the material facts alleged by the prosecution was that the Queen's sleeping room adjoined Bergami's with only a corridor and a cabinet intervening, and that there was no access from the Queen's room to Bergami's except by that passage. To this the servant Majocchi, who for a time slept in the cabinet mentioned, testified as follows, on being asked by Mr. Solicitor-General Copley (afterwards L.C. Lyndhurst) whether there was no other intervening passage: "There was nothing else. One was obliged to pass through the corridor to the cabinet, and from the cabinet into the room of Bergami. There was nothing else." Then, in his cross-examination, Mr. Brougham asked as follows: "Will you swear there was no passage by which Her Royal Highness could enter Bergami's room when he was confined with his illness, except by going through the room, *i.e.*, cabinet where you slept?" Majocchi: "I have seen that passage; other passage I have not seen." Mr. Brougham: "Will you swear there was no other passage?" Majocchi: "There was a great saloon, after which there came the room of Her Royal Highness, after which there was a little corridor, and so you passed into the cabinet. I have seen no other passage." Mr. Brougham. "Will you swear there was no other passage?" Majocchi: "I cannot swear: I have seen no other but this; and I cannot say there was any other but this." Mr. Brougham: "Will you swear that there was no other way by which any person going into Bergami's room could go, except by passing through the cabinet?" Majocchi: "I cannot swear that there is another; I have seen but that; there might have been, but I have not seen any, and I cannot assert but

that alone." Mr. Brougham: "Will you swear that if a person wished to go from the Princess', *i.e.*, Queen's room to Bergami's room, he or she could not go any other way than through the cabinet in which you slept?" Majocchi: "There was another passage to go into the room of Bergami." Mr. Brougham: "Without passing through the cabinet where you slept?" Majocchi: "Yes."

## CHAPTER 87

### As to Alibi

The plea of alibi is readily taken by the accused, but seldom successfully. It consists in the proof that the accused person was somewhere else at the time when a crime was committed. This plea is almost invariably rejected by the Courts on the following grounds: - (i) That the evidence of alibi was not produced at the earliest stage. Hence it has been held that where the accused or his relatives are in possession of oral and documentary evidence of alibi, they must produce it before the investigating officer or Committing Magistrate and its production for the first time before the Sessions Judge gives rise to a presumption against its truth 1934 All. 27, 1929 Nag. 36. (ii) It is generally not supported by documentary evidence. If the oral evidence of the alibi is not supported by any documentary evidence or the witnesses are not persons who would remember the date exactly, it has been held that such evidence is easily obtainable in this country. 1923 L. 232: 25 Cr. L. J. 811. (iii) It generally happens that the accused's counsel does not put any question in the cross-examination of prosecution witnesses as to his defence of alibi. When the defence does not cross-examine the prosecution witnesses concerning the defence version, it is usually sufficient to conclude that it is an after-thought and the defence evidence is a concocted one. 1935 Rang. 393.

### In Cases of Arson

It is sometimes very easy to concoct a false alibi in case of arson or setting fire to a house or other property.

As to the possibility of setting up of false defences of alibi in cases of arson, Dr. Hans Gross says:—"In various cases of arson, the incendiary will do all in his power to prove that at the time conflagration he was far enough away to make it impossible for the fire to be his work. To this end he endeavours to start the fire after the lapse of a certain time and, unfortunately, the means at his disposal are many; some are simple, others very ingenious. The most usual method is to light a candle, the bottom of which rests upon some hay or other inflammable substance. Before the candle has burnt down to the hay, the criminal has time to get well away and can prove that at the time of the outbreak he was, in the presence and to the knowledge of numerous witnesses, drinking in a distant house of refreshment, buying cattle at a market, or attending a ceremony.

"Another common method is to join together some strips of tinder to form a train of considerable length upon the floor, one end being inserted in a box of matches surrounded with inflammable material and the other set fire to. If the tinder has been well impregnated with a solution of saltpeter, its extinction is practically impossible by natural means. Such a solution is also employed to render any flaxen or hempen thread almost inextinguishable.

"An intelligent criminal makes ready use of a clock which raises a hammer at any desired moment; he arranges so that the hammer strikes some explosive substance, which in turn sets fire to some matches. If need be, an ordinary

alarm clock suffices, especially one which lights itself. These latter are furnished with a spring, to the end of which a wax match is fixed ; the spring is stretched and held by a catch. At the desired moment the mechanism moves the catch and the spring is released carrying with it the match, the head of which rubs along a rough surface and catches fire. "A particularly dangerous and common method in America is to utilise an ordinary electrical bell. The sounding part of the bell is replaced by a thin balloon-shaped glass filled with sulphuric acid. The hammer strikes on the glass and breaks it, the sulphuric acid runs into a vessel placed beneath and filled with a mixture of, for example, chloric acid and sugar. This produces fire that can easily be converted into a conflagration. Thus highly insured warehouses can be fired in the night time by an accomplice or even an innocent party ringing the bell, the owner being far away at the time. "In this connection a burning glass is frequently used. In some parts there exists a popular belief that the possession of a burning glass is forbidden by law, solely by reason of the fires it may bring about. In such a case the glass is fixed on a part of the roof where the sun strikes at a particular time and is adjusted so as to direct its rays on some sulphur pitch, matches, straw, etc. If the glass has been placed so as to receive the sun's rays at say 8 A. M. the criminal can obtain 24 hours start, or even longer if the following days happen to be cloudy. "In an old record the author came across an account of a fire caused by a burning glass. A miller's boy had a grudge against a rich peasant whose house was situate opposite to the mill. The youth had left the situation at the mill, and 9 months later the peasant's house was burnt to the ground at mid-day, when every one was in the fields. It was suspected that this boy had arranged a burning glass on the roof of the mill for the purpose of setting fire to the house opposite. He must have chosen for the purpose the upper part of the granary which no one ever visited. Apparently with the help of a cord, he stretched a strong iron spring in front of a sky-light, and stuck a ring of pitch round the end of it. Below the cord he then placed some combustibles and arranged a burning glass, so as to be struck by the sun's rays at a particular time of year and at a particular hour. Everything ready, he had waited till that time of year had gone by, then placed the glass in position and left his situation. Nine months later the sun again came round, struck the burning glass and ignited the fuel. This set fire to the pitch and cord and the latter breaking released the spring, which projected the burning pitch through the sky-light on to the thatched roof of the house opposite, which thus took fire and was burnt to the ground. The thing is not impossible and demonstrates how, with a little skill and ingenuity most extraordinary things may take place. "In the majority of cases the action of the Investigating Officer is fettered by the fact that the *corpus delicti* itself is destroyed in the fire; but not always. Thus on one occasion a farmer desiring to set fire to his large homestead for the sake of the insurances, employed a ribbon of tinder. To make certain, he arranged two trains in two different parts of the building as far distant from each other as possible. One of the two acted but the other failed, the tinder having gone out at one of the places where it had been sewn together. The portion of the house containing this latter was saved and the half burnt train discovered. "When everything is consumed, it must not be forgotten to investigate whether the person suspected has in his possession or has procured articles which may be employed as fire raisers, candle, etc." See Criminal Investigation by Hans Gross, p. 759.

### Presumption from Producing false evidence in support of alibi

The fact that the accused made efforts to concoct false evidence of alibi is relevant as conduct under Section 8 of the Evidence Act, and good

presumptive evidence against the accused. *See Will's Circumstantial Evidence* 193, 1925 L. 323: 26 Cr. L. J. 760, 68 P.R. 1866. But the fact that an accused person has failed to establish his plea of alibi does not give rise to a presumption against him as to his complicity in the crime. 1921 Cal. 252: 23 Cr. L. J. 244. An attempt to fabricate false evidence in support of a plea of alibi does not alone prove that the accused committed the offence charged. 1925 L. 42: 26 Cr. L. J. 393, because there have been cases where innocence, under the pressure of menacing appearances has fatally committed itself by the simulation of facts for the purpose of evading the force of circumstances of apparent suspicion. *See Will's Circumstantial Evidence*, p. 194. If the defence of alibi breaks down, its strong inference is that in all probability the accused was where the prosecution says he was. 1934 C. 719: 151 I. C. 473. If an over-zealous relation attempts to establish alibi, it is no ground for concluding that the accused is guilty. 1933 Oudh 432: 147 I. C. 113. Innocent persons not unusually raise a false plea of alibi. 22 P. R. 1888.

### Time of Setting up Plea of Alibi

If the defence of alibi was not set up at the earliest opportunity, it will give rise to a presumption against its truth. 1934 A. 27.

There are three occasions upon which accused has opportunity of giving explanation of his conduct or of mentioning any defence he may have. *First*, when he is originally charged, whether by an employer, any other person, or police officer making enquiries or effecting his arrest. *Secondly*, when formally charged at the police station; and *thirdly*, after the evidence is given against him before a Magistrate. It is a common trick of Advocacy to say in answer to a question by Court, "I reserve my defence, I call no witnesses here and I offer no evidence." Such a beginning is, to say the very least, a bad introduction to a true story. *See Will's Circumstantial Evidence*, 6th Ed. p. 102 and 1935 Sind 145 (164).

The credibility of an alibi is greatly strengthened if it be set up at the moment when the accusation is first made, and be consistently maintained throughout the subsequent proceedings. These conditions were remarkably fulfilled in the memorable case of Abraham Thornton. To all appearance the guilt of the prisoner was the necessary conclusion from the supposed inculpatory facts, and yet he had been seen by a number of independent and unimpeachable witnesses at such a distance from the scene of the alleged murder, at the very time when it must have been committed, if at all, as to render it physically impossible that the deceased could have been murdered by him; and all the facts supposed to have been the conclusive indication of guilt were satisfactorily explained by collateral circumstances and by a different hypothesis. On the other hand, it is a material circumstance, to lessen the weight of this defence, if it be not resorted to until some time after the charge has been made, or if nothing happened immediately after the transaction to lead the witnesses to watch so as to be accurate with respect to the hour or time to which they speak, even supposing them to depose under no improper bias or influence, or if having been once resorted to, a different and inconsistent defence is afterwards set up. There are many other sources of fallacy connected with this particular defence; such as mistake as to the person from want of opportunity of accurate observation or other causes of misconception—the possible difference of clocks, or the fraudulent alteration of them to tally with other facts; as where one of the perpetrators of a murder hastened home, put back the clock two hours; and went to bed; and shortly afterwards awoke his servant, and told her to go downstairs and see what the time was, which she did, not knowing that the



clock had been tampered with, so that her testimony led to his acquittal. A group of irrelevant facts is sometimes artfully arranged so as to give an appearance of reality and coherence to the defence, the facts being true in themselves, but fraudulently referred to the critical day or time instead of to the real time of their occurrence; or such a mis-statement may take place by unintentional mistake. In an American case, where several persons were tried for an atrocious murder, it appears to have been a part of the plot for each of the prisoners to sleep on the night of the murder with some one who could testify to an alibi. One of the murderers had requested a man to sleep in his house; but the witness stated that he might have been absent while he was asleep. Another of them went several miles from the place of the murder to sleep, and the person in whose house he stayed had no doubt that he was within doors the whole night. Two others of them went to a tavern several miles from the scene of the murder, and went to bed together; but in the night one of them was discovered leaving the house, although he evidently wished to be unnoticed; and he was absent so long, not returning till the morning, as to alarm the tavernkeeper, who with his wife made diligent search for him in the neighbourhood but his bed fellow manifested no anxiety or alarm, and got up and assisted in the search. Case of Hauer and others, 2 Chandler, Amer. Cr. Tr. 353. This defence is especially easy of fabrication or mistake in regard to the essential element of time, where a few minutes may be of vital moment; and the unblushing effrontery with which witnesses sometimes present themselves to speak to time without regard to plausibility or consistency, is truly surprising. On a trial for murder, two witnesses called to support a defence of an alibi swore that they were able to speak positively to the time from having looked at a clock; but upon being required by the counsel for the prosecution to tell the time by the clock in Court, after some hesitation admitted they were unable to do so. *Reg v. Cane and others*, 34 C. C. C. Sess. Pap. 284, June 20, 18.

#### Value of Alibi Evidence

Alibi has always been a favourite defence with calculating criminals. As alibi evidence is generally set up and false evidence is produced in support of the same, the Courts have laid down that such evidence should be generally viewed with suspicion. 1935 L. 280 : 85 Cr. L. J. 1180.

"If I prove to you, gentlemen" said a young barrister addressing the Jury in a case before Justice Hawkins, "that my fortunate and estimable client was a hundred miles away from the scene of burglary at the time that foul deed was committed, then, I presume, that fact will be sufficient for you."

"Of course, I cannot speak for the Jury," Justice Hawkins broke in gentle tones, addressing the advocate, "but I can assure you that I myself shall not be particular to a mile or two. If you can show that the prisoner was even a mile or half a mile at the time, I will give him the benefit of doubt."

Where an Investigating Officer has to combat a false alibi, it is certainly the most dangerous obstacle to the conviction of the real culprit. Karl Stenier truly said, "to be a good poacher, three things are indispensable: a gun that takes to pieces; a blackened face: and a good alibi." That is just what happens in countries where poaching is common. In the mountains, things almost always happen thus: a wood cutter goes poaching: the keepers surprise but cannot catch him because he has got the start of them; the gun is concealed in a crevice, in the rock; and the cattleman and his wife swear that at the very hour when the keepers pretend to have seen him, he was in their hut, patching his working clothes. Everything is carefully and beautifully arranged beforehand, and all goes well so long as the Investigating Officer does not poke his nose into details, does not put questions too precise and troublesome, and asks everything he is at

liberty to ask : how they were seated, how long they were together, what they did, what they said, and what other things occurred, etc. If the Officer has taken the indispensable precaution of summoning the accused and his witnesses at the same time, and of so ordering his examination that a witness once examined cannot communicate with those yet to come; it will be very odd if he cannot have contradictory statements. The most complicated proofs of alibi, concocted by the most experienced scoundrels, are just the same. The only difference is that they are perhaps got up more carefully; yet we believe it is always possible to prove the falsity of a false alibi. See Hans Gross, pp. 99—102.

It is unfortunately a common practice of the Police arriving at a scene of dacoity, on the villagers being unable to give any indication as to who have robbed them, to demand the names of their enemies and, unless these have conclusive proof of alibi, immediately to arrest them. For reasons stated above a complaint may be most unwilling to bring any charge against the members of the robber gang known to frequent the neighbourhood but he leaps at the chance of implicating some of his particular enemies whom no Indian villager is without, and does all in his power to assist the police in fastening the offence upon them. If then the Investigating Officer discovers that the persons implicated in a dacoity are enemies of the parties robbed, he must view the evidence of these latter with greatest suspicion." See Hans Gross, p. 759.

An unsuccessful attempt to establish an alibi is always a circumstance of the greatest weight against an accused person. This defence is frequently fabricated and liable to many sources of fallacy; and a learned Judge has said that if the defence turns out to be untrue, it amounts to a conviction. There is, indeed, no logical inconsistency between a defence which says the evidence as it stands does not prove that the person charged is guilty and the additional assertion "I cannot be the guilty person if there is one because I was hundred miles away at the time when the offence was committed" but there is great danger in a double defence of that kind. Jurymen are very apt to think that it shows a want of confidence in each branch and the double answer to the accusation is very seldom met with in practice. If the defence of an alibi is the only answer attempted and it breaks down, the case for the prosecution is left unanswered. It should not, however, be overlooked that such is the weakness of human nature, that there have been cases where innocence, under the pressure of menacing appearances, has fatally committed itself, by the simulation of facts for the purpose of evading the force of circumstances of apparent suspicion. Foster's Discourses on the Crown Law, p. 368 30 State Trials, pp. 58—78.

A group of irrelevant facts is sometimes artfully arranged so as to give an appearance of reality and coherence to the defence, the facts being true in themselves, but fraudulently referred to the critical day or time, instead of to the real time of their occurrence, or such a misstatement may take place by unintentional mistake. 31 State Trials, pp. 1074, 1091.

The following decisions will be found useful:—

It is open to the accused to plead alibi and alternatively right of private defence. 40 A. 284, 52 I. C. 4. False plea of alibi is not sufficient evidence of guilt of accused. 57 P. R. 1866 Cr., 22 P. R. 1868 Cr. 1925 L. 42 : 84 I. C. 937 : 26 Cr. L. J. 393. Alibi pleaded and not proved does not give rise to any presumption of crime. 25 C. W. N. 682, 1921 C. 252 : 23 Cr. L. J. 244 : 66 I. C. 80.

The burden of proving alibi is on accused. It is not incumbent on prosecution to prove the negative. 83 I. C. 513. If the oral evidence of alibi is not supported by any documentary evidence and witnesses are not persons

who would remember the date precisely, such an evidence is easily obtainable in this country. 1923 L. 232 : 25 Cr. L. J. 811. Alibi evidence should be scrutinized very carefully. It is easy to set up alibi, though difficult to prove it. 1928 M. 791 : 110 I. C. 461 : 29 Cr. L. J. 717. In case of alibi accused must give explanation of the occurrence. 1923 Oudh 217. Innocent persons not unusually raise false plea of alibi. 22 P. R. 1888 Cr. If accused does not disclose his exact defence in Committing Magistrate's Court or in Sessions Court but sets up alibi, a certain presumption arises against him as to his guilt. 1929 Nag. 36 : An attempt to fabricate false evidence of alibi raises adverse presumption. 1925 L. 323 *Cont.*, 1925 L. 42 : 26 Cr. L. J. 893. If evidence of alibi was clearly in the mind of the Judge, such absence of finding on the fact is immaterial. 1929 Pat. 281.

In murder cases, witnesses supporting plea of alibi must be produced. Whether such witnesses are reliable or not is to be decided by the Court and not the prosecution. 1934 A. 908. Alibi evidence is generally to be viewed with suspicion. 1935 L. 230 : 85 Cr. L. J. 1180. Witnesses to prove alibi must be called by the accused who takes such defence. Such evidence must be tested by cross-examination by the Crown. 1935 C. 518. If most important and conclusive evidence of alibi is not produced by accused or his relatives at once and is concealed up to Sessions trial, it creates suspicions that it is forged one. 1934 A. 27 : 56 A. 854.

When accused pleads alibi and he is found guilty of having committed the offence on date other than that entered in the charge sheet, the conviction is not legal. 1934 L. 455. An alibi will receive most credence if raised at the earliest possible moment. (1931) 23 C.A.R. 56 reported in A.I.R. 1933 Journal 119 (120), 56 A. 854. Prosecution should not be allowed to call witnesses to contradict alibi witnesses. (1928) 21 C. A. R. 3 and (1927) 2 K. B. 587. Reported in A.I.R. 1933 Journal 119 (120). The fact that accused made efforts to concoct false evidence of alibi is relevant as conduct and good presumptive evidence against the accused. 1925 L. 323 : 26 Cr. L. J. 760. Will's Cir. Ev. Ind. Ed. 193, 68 P. R. 1866. For other cases *See* Prem's Criminal Practice. 1947.

### Illustrations

(i) At a trial at Warwick some years ago a remarkably well planned alibi was set up. The charge against the prisoner was burglary. An Irish witness was called for the defence, and stated that at the time the burglary was committed the prisoner was with him and four or five other persons some miles from the scene of the crime. The time of course was a material element in the case, and the witness was asked how he fixed the exact time. He said there was a clock in the room where he and the prisoner were and that he looked at it when they went in and when they left. He was then told to look at the clock in Court and say what time it was. The witness stared vacantly for a considerable time, and then said it was "such a rum'un he could not tell."

"Cannot you tell a clock?"

"Shure, sor, I cannot tell that un!"

What was still more strange, the same question was put to every witness; and there was only one out of some six persons who could tell what o'clock it was. And yet they all swore the exact time deposed to by the first witness, and repeated the answer as to how they knew it. Of course the alibi totally broke down, and the prisoner was convicted. Harris on Hints on Advocacy, XIV Ed., 1911, pp. 67, 68.

(ii) Witnesses, who come forward to prove alibi by the clock, sometimes prove very unsatisfactory. In a murder case at the Central Criminal Court, two witnesses swore most persistently to the prisoner having been in their

company at the hour when the prosecution contended he was engaged in the crime on cross-examination.

Q. "Are you quite certain of the exact time?" A. "Certain."

Q. "How are you so sure about it?" A. "We were in the Bar public house, and I saw the time by the clock in the bar," replied the witness, "It was 27 minutes past 9."

Q. "You saw the time yourself?" A. "Yes."

One of the detectives engaged in the case here whispered something to the barrister, and he turned to the witness once more.

"You see that clock," he said, pointing to the clock in the Court. "What is the time by it?"

The witness turned ghastly pale, scratched his head, gasped, and was silent. He could not tell the time. The alibi bubble was burst. The prisoner was condemned. 15 M. L. J. (Jour.) 129.

(iii) A case in which an innocent man was able to establish an alibi and refute a mass of extraordinary circumstantial evidence against him was that of the Cannon Street murder. Sarah Milsom was the house-keeper to a large firm, with premises in Cannon Street, in which she lived. Upon the night of the murder, a man, whose duty it was to lock up the building after the hands had left, closed the place and duly delivered the keys to Mrs. Milsom. The house-keeper and a woman, who acted as cook, were now the only persons in the place. The cook, in her evidence, stated what happened. Mrs. Milsom was sitting in the dining room and the cook was in the bed room, when about ten minutes past 9 there came a ring at the door bell. The witness was about to go down to answer it, when Mrs. Milsom called out to her: "Elizabeth, the bell is for me. I will go."

The cook stayed in her room, but later on went downstairs when she was horrified to find Mrs. Milsom laying dead in the corridor, just inside the door. She had been killed by a terrible blow with a crowbar that was lying close by the body. An arrest was made, and the prisoner was defended by Sergeant Ballantyne and Mr. Montague Williams.

The defence was able to prove, by the evidence of witnesses, that the prisoner was at Eton and Windsor upon the night of the murder at times which rendered it impossible for him to have committed the crime. A boot-maker and the boot-maker's son, for whom the accused man worked, had seen and spoken to him there. The accused was acquitted. The murder has remained undiscovered up to this day. 15 M. L. J. (Jour.) 431.

(iv) A young girl who lived with her parents in a lonely part of Kirkeudbright was one day left alone in their cottage while her father and mother were harvesting. On their return the girl was found murdered. A surgical examination revealed the fact that the injuries inflicted must have been the work of a left handed man, and the police discovered in the soft ground around the cottage the imprints of the boots of a running man. These impressions corresponded exactly with the boots of a young labourer named William Richardson who was acquainted with the dead girl, and who was also left-handed. Richardson, on being asked where he was on the day of the crime, declared that he was employed the whole day in the work of his master, a farmer, some distance away. The fact was borne witness to by the farmer and Richardson's fellow-servants, and the police were baffled. The alibi, in spite of all the other suspicious circumstances against the prisoner, appeared so strong as to be unassailable. But the police persevered, and at last one of the detectives discovered that Richardson and his fellow-servants had that day been employed in driving their master's carts. These carts

had been driven in a direction which took them close to the scene of crime, and while they had been passing through a wood, Richardson had requested his comrades to stop a few minutes while he ran to a smith's shop and back. They did so, and one of the drivers remembered that Richardson when he returned had been absent half an hour by his watch. This was ample time for him to run to the cottage, commit the murder and run back again. He had not been to the smith's shop. The alibi thus broke down, Richardson was found guilty and, before the execution, he confessed the justice of his sentence. 15 M. L. J. 431-432.

(v) A Kansas City Lawyer while in St. Louis the other day, dropped in on a friend who is a Judge, and found him holding Court. A prisoner, with a well-known criminal past, was being tried for the hold-up of a Dutch grocery man. In the robbery the Dutchman had grappled with one of the two robbers and had wrested his pistol from him. The robbers escaped but the storekeeper retained the revolver, and it was offered in evidence at the trial. The prisoner managed to "make up" a pretty fair alibi, and, although the Dutchman positively identified him as the smaller of the two robbers, he was acquitted. After the jury had delivered its verdict the young man approached the Bench and said: "Can I get my revolver back?"

The young man thereupon, realizing his mistake, ran out of the Court room. The jurors, who had not dispersed, were mad, and the Judge, who had never been much in sympathy with the alibi, was madder still.

"Can't we get him back here and convict him?" asked the foreman.

"No," replied the Judge in disgust, "he has been acquitted, but I hope he robs the home of every one of you." 16 M. L. J. (Jour.) 173.

(vi) On the trail of a man for the murder of a young woman under circumstances of the strongest adverse presumption, the proof was that the deceased had been murdered at her father's cottage in the forenoon of the day in question, and the prisoner alleged that he was at work the whole of that day with his fellow labourers at a distance from the cottage; but it turned out that he had been absent from his work about half an hour, an interval sufficiently long to have enabled him to reach the cottage, commit the murder, and rejoin his fellowworkmen. He was convicted, and before his execution confessed his guilt. 60 C. C. Sess. Pap. 461 (Oct. 1, 1864).

(vii) One of the most extraordinary and instructive cases of this kind that has ever occurred was that of Abraham Thornton, who was tried at the Warwick Autumn Assizes, 1817, before Mr. Justice Holroyd, for the alleged murder of a young woman, who was found dead in a pit of water about seven o'clock in the morning with marks of violence about her person and dress, from which it was supposed that she had been violated, and afterwards drowned. The deceased's bonnet and shoes and a bundle were found on the bank of the pit. Upon the grass, at a distance of forty yards there was the impression of an extended human figure, and a large quantity of blood was upon the ground near the lower extremity of the figure, where there were also the marks of large shoe-toes. Spots of blood were traced for ten yards in a direction leading from the impression to the pit upon a footpath, and about a foot and a half from the path upon grass on one side of it. When the body was found, there was no trace of any footstep on the grass, which was covered with dew not otherwise disturbed than by the blood; the from which circumstance it was insisted that the spots of blood must have fallen from the body while being carried in some persons's arms. Upon the examination of the body, about half a pint of water and some duckweed were found in the stomach, so that the deceased must have been alive when immersed in the water. There were no physical indications inconsistent with intercourse with consent.

Soon after the discovery of the body, there were found in a newly harrowed field adjoining that in which the pit was situate, the recent marks of the right and left footsteps of the prisoner and also of the footsteps of the deceased, which from the length and depth of the steps, indicated that there had been running and pursuit and that the deceased had been overtaken. From that part of the harrowed field where the deceased had been overtaken her footsteps and those of the prisoner proceeded together, walking in a direction towards the pit and the spot where the impression was found until the footsteps came within the distance of forty yards from the pit, when from the hardness of the ground they could be no longer traced. The marks of the prisoner's running footsteps were also discovered in a direction leading from the pit across the harrowed field; from which it was contended that he had run alone in that direction after the commission of the supposed murder. The marks of a man's left shoe (but not proved to have been the prisoner's) was discovered near the edge of the pit, and it was proved that the prisoner had worn right and left shoes. On the prisoner's shirt and breeches were found stains of blood, and he acknowledged that he had intercourse with the deceased, but alleged that it had taken place with her own consent. The defence set up was an alibi, which, notwithstanding these apparently decisive facts, was most satisfactorily established. The prisoner and the deceased had met at the dance on the preceding evening at a public house, which they left together about midnight. About three in the morning they were seen talking together at a stile near the spot, and about four o'clock the deceased called at the house of Mrs. Butler, at Erdington, where she had left a bundle of cloths the day before. Here she appeared in good health and spirits, changed a part of her dress for some of the garments which she had left there, and quitted the house in about a quarter of an hour. Her way home lay across certain fields, one of which had been newly harrowed, and adjoined that in which the pit was situate. The deceased was successively seen after leaving Mrs. Butler's house by several persons, proceeding alone in a direction towards her own home, along a public road where the prisoner, if he had rejoined her, could have been seen for a considerable distance; the last of such persons saw her within a quarter of an hour afterwards, that is to say, before or about half-past four. At about half-past four, and not later than twenty-five minutes before five, the accused was seen by four persons, wholly unacquainted with him, walking slowly and leisurely along a lane leading in an opposite direction from the young woman's course towards her home. About a mile from the spot where the prisoner was seen, he was seen by another witness about ten minutes before five, still walking slowly in the same direction with whom he stopped and conversed for a quarter of an hour, after which, at twenty-five minutes past five, he was again seen walking towards his father's house, which was distant about half a mile. From Mrs. Butler's house to the pit was a distance of upwards of a mile and quarter; and allowing twenty minutes to enable the deceased to walk this distance, and time of her arrival at the pit would appear to be twenty-five minutes before five; whereas the prisoner was first seen by four persons above all suspicion at half-past four or twenty-five minutes before five, and the distance of the pit from the place where he was seen was two miles and a half. Upon the hypothesis of his guilt, the prisoner must have rejoined the deceased after she left Mrs. Butler's house, and a distance of upwards of three miles and a quarter must have been traversed by him, accompanied for a portion of it by the deceased and the pursuit, the improper intercourse, the drowning and the deliberate placing of the deceased's bonnet, shoes, and bundle, must have taken place within twenty or twenty-five minutes. The defence was set up at the instant of the prisoner's apprehension which took place within a few hours after the discovery of the body, and was maintained without contradiction or variation before the coroner's inquest

and the Committing Magistrate, and also upon the trial, and no inroad was made on the credibility of the testimony by which it was supported. The various timepieces to which the witnesses referred and which differed much from each other, were carefully compared on the day after the occurrence and reduced to a common standard, so that there could be no doubt at the real times as spoken to by them. Thus, it was not within the bounds of possibility that the prisoner could have committed the crime imputed to him; nevertheless, public indignation was so strongly excited that his acquittal, though it afforded a fine example of the calm and unimpassioned administration of justice occasioned great public dissatisfaction. There was, nevertheless a total absence of all conclusive evidence of a *corpus delicti* which the jury were required to infer from circumstances of apparent suspicion. The deceased might have drowned herself in a moment of reaction after guilty excitement, no longer kept up by the companionship of her seducer. It was possible that she might have sat down to change her dancing shoes for the boots which she had worn the preceding day and carried in her bundle, and fallen into the water from exhaustion; for she had walked to and from market in the morning, had exerted herself in the evening and had been wandering all night in fields without food. The allegation that the prisoner had used violence to the deceased, and therefore had a motive to destroy her, was mere conjecture; and from the circumstance of her having been out all night with the prisoner, with whom she was previously unacquainted, and from evidence supplied from Mrs. Butler's house there could be no doubt that the intercourse had taken place before her call there at 4 A. M., at which time she made no complaint but appeared composed and cheerful. Again, the inference contended for from the state of the grass, with drops of blood upon it where the dew had not been disturbed, was equally groundless; for there was no proof that the dew had not been deposited after the drops of blood and it clearly appeared that the footsteps of the prisoner and the deceased could not be traced on other parts of the grass where, beyond all doubt, they had been together in the course of the night. Now, suppose that the *alibi* had been incapable of satisfactory proof, that the prisoner had not been seen after parting from the deceased, and that the inconclusiveness of the inference suggested from the discovery of drops of blood on the grass, where there were no foot marks had not been manifested by the absence of those marks in other places where they had unquestionably been together in the night, the guilt of the prisoner would have been considered indubitable, and his execution certain. See Hans Gross.

(viii) A brilliant young Irish counsel was defending a smart burglar; and upon the depositions the case was "dead" enough. If the witnesses were believed there was no answer. None could be called for the prisoner without being exposed to cross-examination and giving away "the last word."

After the case had been proved, the defending counsel was asked the usual question, "Do you call witnesses?" "No, my Lord, only to character."

An elderly farmer stepped into the box and was asked if he knew the prisoner. The old man shook his head and answered, "I know him only too well, sir."

"You have come to give him a character, I understand?"

"Yes," said the farmer, "and I'll give him one too!"

"You can stand down," said the prisoner's counsel.

"No, no you can't" retorted his opponent, who was watching his opportunity, and could not be content with leaving well alone. Q. "What character does the prisoner bear?" A. "A bad one sir." Q. "In what way?" There was no objection taken to the question, so the counsel went boldly along, triumphing in his success. A. "Well," said the farmer, "he broke into



my house and stole a ham." Q. "When?" The time turned out to be almost exactly the same as when he was said to have committed the burglary for which he was indicted, at a place which was at least *sixty miles away*.

Referring to this incident Mr. Harris says:—"It was always one of the mysteries of the profession to me that so many advocates think they *must ask something*: as if the best advocacy, nine times out of a dozen, is not silence."

Of course, there was an acquittal; and it afterwards transpired that the old farmer *was the prisoner's uncle*. See Harris, Illustrations in Advocacy.

Sometimes alibi witnesses in Criminal cases are over zealous in their attempt to aid the defence. In a rape case a gas station worker was produced by the defence to prove that the accused had purchased gasoline from him at his station about 10 miles from the scene of occurrence and at a time which the prosecution alleged the crime was committed. His testimony was to the effect that this incident took place five months previous to the trial and he was definitely positive about everything that he had witnessed. The Counsel suspected that the witness was exaggerating. He therefore gave a full swing to his imagination. The cross examination proceeded thus:

Q. How much gas did the defendant order? A. 5 gallons.

Q. How much did the gas come to? A. Dollars 1. 11.

Q. How did he pay you? A. With a Dollar 2 bill.

Q. What change did you give him back? A. 89 cents. Half a dollar, a quarter a dime and four pennies.

Q. How many men were in the car with him? A. Three.

Q. How were they dressed? A. Two had caps and the defendant had a slouch hat on.

Q. How soon there after was your next customer? A. Ten minutes.

Q. What kind of car? A. A blue Buickroadster, 1932 model with wire wheels.

Q. How much gas did he buy? A. Ten gallons and a quart of medium penn oil.

Q. How did he pay you? A. A five dollar bill.

Q. How much was his bill? A, Dollar 2. 22.

Q. What change did you give him? A. Two one dollar bills, a half dollar, two dimes, a nickel and three pennies.

Q. How much later was the next one? A. Fifteen minutes.

Q. What kind of car was that? A. A yellow Nash sedan, 1930 model.

Q. How much gas did he buy? A. Five gallons.

Q. How was he dressed? A. A light grey suit, grey slouch hat, maroon tie and handkerchief to match.

The Judge and Jury laughed. The alibi was completely destroyed.

## CHAPTER 38

### As to Collateral Matters or (Indirect Cross-Examination)

If you are desirous of getting an answer to a particular question' do not put it directly. The probability is that the witness will know your difficulty and avoid giving you exactly what you wish. If not altogether straightforward (and for such witnesses you should always be prepared) he will be on the alert and, unless you circumvent him, will evade your question. On this point Harris in his work on Hints on Advocacy says:—"A series of questions, not one of them indicative of, but each leading up to the point, will accomplish the work,



If the fact be there, you can draw it out, or if you do not so far succeed, you can put the witness in such a position that from his very silence the inference will be obvious. One of the greatest cross-examiners of our day advised a pupil in cross-examining a hostile witness upon a point that was material, to put ten unimportant questions to one that was important, and when he put the important one, to put it as though it were the most unimportant of all. Harris' *Hints in Advocacy*, p. 57.

The line of opening questions should be remotely related to the subject and the witness should not be allowed to perceive the object in view. All suspicions in the mind of the witness should be allayed, so that he may be taken completely off his guard. The skilful cross-examiner may sometimes beguile a hostile witness into relating a version of the transaction which is wholly inconsistent with that told by him upon his own direct examination or which is entirely at variance with what has been previously related by another witness called by the adverse party. In either case, the purpose of the cross-examination has been accomplished, the witness has either contradicted himself or else has discredited the evidence of his fellow-witness. The adversary will be then put in the dilemma of explaining away the contradictions of his own witnesses. 14 Cr. L. J. 20.

There is the old theory, never ask a question unless you are sure of the answer, but that would destroy a good deal of cross-examination. That is not the way in which I put it. I put it rather that no counsel should ever risk an important question unless he knows and feels the question is proper and right in its form, having regard to form only. I will tell you why this is a dangerous thing: counsel on the other side are waiting for an opportunity at every turn to ease off their client if he is in the hands of a skilful cross-examiner. Counsel gets up very often and objects; he is asked, what is your objection? 'Well, I object to the form of the question.' It may or may not be a good objection, but you have defeated, by your objectionable form of question, that which you have been labouring to obtain for 15 minutes or half an hour. How did you do it? The witness has stopped, but he has heard the question, and he is given a moment or two of thought, and he knows what you are driving at, no matter how cleverly you have put it. And by the time you get back to the question, the witness has got his 'wind,' and you get your answer, favourable of course to the opposing party. 11 Cr. L. J. p. 79.

When you have scored some points which are sufficient to discredit him, it will usually be the more prudent course to leave him there, self-condemned, instead of continuing the examination, lest you should give him time to rally and perhaps contrive a story that will explain away his contradictions. If, however, his lesson is well learned, and he repeats the narrative very nearly as at first, you will have to try another course, which will tax your ingenuity and patience. Procure from him in detail, and let his words be taken down, the particulars of his story, and then question him as to associated circumstances as to which he is not likely to have prepared himself, and to answer which, therefore he must draw on his invention at the instant. Some ingenuity will be necessary on your part, after surveying his story, to select the weakest points for your experiment, and to suggest the circumstances least likely to have been pre-arranged. Having obtained his answers, do not permit him to pause, but instantly take him to a new subject, lead his thoughts away altogether from the matter of your main topic. The more irrelevant your queries the better, your purpose is to occupy his mind with a new train of ideas. Conduct him to different places and persons and events. Then, as suddenly, in the very midst of your questionings, when his mind is the most remote from the subject, when he is expecting the next question to relate to the one that has gone before,

suddenly return to your first point, not repeating the main story, for this, having been well learned, will probably be repeated as before, but to those circumstances associated with it upon which you had surprised him into invention on the moment. It is probable that, after such a diversion of his thoughts, he will have forgotten what his answers were, what were the fictions with which he had filled up the accessories of his false narrative, and having no leisure allowed to him for reflection, he will now give a different account of them, and so betray his falsehood. Of all the arts of cross-examination, there are none so efficient as this for the detection of a lie. "The chief skill in cross-examination consists in concealing from the witness the object with which questions are put, and the greatest ingenuity of a cross-examiner lies in his success in undoing the witness' self-possession. A truthful witness has to fall back upon the resources of his actual and real perception, and cannot be taken away from his real position by any contrivance however well-conceived it may be. Let the question be put to him in any guise, he will be ready to answer it from his real perceptions of the facts as they occurred to him. His strength lies in relying upon his impressions of the events as originally received by him, and unless he is induced by some other motive to describe them otherwise, he cannot but rely upon his original impression. A witness, on the other hand, who is speaking otherwise than from his direct knowledge is liable to go astray in his mind is diverted from a false or imaginary position. He is liable to forget his statement of the facts if his attention is momentarily diverted into other channels requiring fresh mental efforts on his part. In order to effect this you ought to try first to inquire closely into the resources of his knowledge. "After surveying fully the story of the witness, you ought to select the weakest point for your experiment, and to suggest the circumstances least likely to have been pre-arranged. Having obtained his answers permit him no pause, but instantly take him to a new subject, lead his thoughts altogether away from the matter of your main operation. The more irrelevant your queries the better; your purpose ought to be to occupy his mind with a new train of ideas. Conduct him to different places, and persons and events. Then as suddenly, in the very midst of your questioning, when his mind is the most remote from the subject, suddenly return to your first point, not repeating the main story, for this having been well learned will probably be repeated as before, but to those circumstances associated with it upon which you had surprised him into invention on the moment. It is probable that, after such a diversion of his thoughts, he will have forgotten what his answers were, what were the fictions with which he had filled up the accessories of his false narration, and having no leisure allowed to him for reflection, he will now give a different account of them and so betray his falsehood." See Hardwick, p. 213.

"A witness who is telling a false story can rarely so construct it that it shall be consistent with other associated circumstances which it is impossible to anticipate. "Hence it is that you must try the witness by questions on matters which only bear indirectly upon the point at issue. As, for instance, if he has sworn that on a certain day a certain person made to him a certain statement, you cannot directly shake the fact thus sworn to, for the witness has but to adhere to his assertion and he will baffle any amount of direct interrogation. But it is not at all likely that he has prepared himself with all the accompanying particulars, therefore you put such questions as these: Where was the conversation held? At what time of the day? Who was present? Were they sitting or standing? How did he come to the place? Whom did he meet on the way? How was he dressed and the other party? Did they speak loud or low? Did they eat or drink together, and what? Did anybody come in while they were talking? How long were they together? When they parted, which way

did each take? Whom did he meet afterwards? At what time did he reach his home? and so forth, as the particular circumstances of the case may suggest, but always, if possible, preferring facts spoken to by other witnesses so that you may expose him, not only by his self-contradictions, but by the testimony of others. When questions of this kind are rapidly pushed, they deprive the false witness of opportunity to fit them to his previous story. You should also carefully avoid putting them in any natural sequence of time or place, for that is to suggest to him a story which he will invent quite as rapidly as you construct your questions. Dislocate them as much as possible. Take now one part of the story, then another. Dodge him backward and forward, one object to the other, so that it shall be impossible for him to be prepared by one question for the next, or that one answer shall not be the prompter of its successor. The difficulty of doing this well is very great, and therefore, perhaps, it is that it so rarely seems to be well done, but it is an accomplishment wanting which the advocate is not the master of his art." Wrottesley, 145.

Referring to this point Harris, in his *Hints on Advocacy*, says:— "In cross-examining a witness who lies, you must apply the test of surrounding circumstances, and compare his testimony with that of the other witnesses. The latter will be the severest and the surest test if you apply it to the smaller details. It need hardly be said that the greater the number of witnesses to prove a concocted story the greater the certainty of exposure by a skilful cross-examiner. The main facts of a story may be so contrived as to be spoken to by all the witnesses; but they cannot agree upon details which never occurred to them, or concoct answers to questions which they have no conception of. But even in this mode of cross-examination you must be careful not to obtain an apparent corroboration where you seek contradiction. The way to avoid this is *not to put the same question upon some important piece of evidence to every witness*. If you have got the first contradicted by the second, let the matter rest; the next witness may make a guess and corroborate the first, which will materially weaken the effect of the contradiction. By judiciously pursuing this line you may get all the witnesses to contradict one another." See Harris, pp. 64-65.

One of the greatest instances in modern times of this class of lying witness was the notorious "Claimant" and his supporter Luie in the famous Tichborne case. "It was wonderful how Orton told the story of the wreck, of his having been rescued and conveyed to Australia, of his life in the bush, of his return and his recognition by persons who had known his life in the bush, of his return and his recognition by persons who had known in the real heir to the baronetcy. There was, doubtless falsehood stamped unmistakably upon the whole story, but what gave it the appearance of truth which it presented to some minds was, not the probability of any part of it, but the improbability that so ignorant a man could so skilfully have constructed so wonderful a story; that it should not have broken down by its own inherent weakness even while being narrated-in-chief to the Jury. We know as a fact that it did not, and it therefore follows that a tissue of lies may support itself before a tribunal constituted for the purpose of eliciting the truth. Even after he had been discovered and exposed as an impostor, there were thousands who believed his story and believe it to this day. A lying witness therefore is not always to be disposed of by a flourish of the hand." See Harris, pp. 62-65.

"In cross-examination in general, the great art is to conceal especially from the witness the object with which the interrogator's questions are put. One mode of accomplishing this is by questioning the witness on indifferent matters." See Best's *Law of Evidence*.

"Carry the witness to some distant and collateral topic and try his memory upon that, so as to divert his thoughts from the main object of the inquiry, and prevent his seeing the connection between the tale he has told and the question

you are about to put to him. Then, by slow approaches, bring him back to the main circumstances, by the investigation of which it is that you propose to show the falsity of the story. The designs of his manoeuvre is, of course, to prevent him from seeing the connection between his own story and your examination, so that he may not draw upon his imagination for explanations consistent with his original evidence, your design being to elicit inconsistency and contradictions between the story itself and other circumstances, from which it may be concluded that it is a fabrication."

But in the process—somewhat tedious, it is true, to yourself and not always comprehended by others—the art of witness will not be the only nor the severest trial of your temper. Too often you will find the Judge complaining of the tediousness of repetition. He does not always see your drift, and especially if you are young, he is apt to conclude that you are putting questions at random, and to refuse you credit for a meaning and design in your queries. You must, in such case, firmly but respectfully assert your right to conduct your examination after your own fashion, and proceed without perturbation, in the path your deliberate judgment has prescribed. Your duty is to your client.

### Illustration

"In a case of affiliation of a bastard, the mother had sworn distinctly and positively to the person of the father, and to the time and place of their acquaintance, fixed as usual at precisely the proper period before the birth of the child. In this case the time sworn to was the middle of May; and the place the putative father's garden; for an hour the witness endured the strictest cross-examination that ingenuity could suggest; she was not to be shaken in any material part of the story. She had learned it well and with the persistence that makes women such difficult witnesses to defeat, she adhered to it. She was not to be thrown off her guard by a question for which she was not prepared, and the examination proceeded thus:—

Q. "You say you walked in the garden with Mr. M.—?" A. "Yes."

Q. "Before your connection with him?" A. "Yes."

Q. "More than once?" A. "Yes; several times."

Q. "Did you do so afterwards?" A. "No."

Q. "Never once?" A. "No."

Q. "Is there fruit in the garden?" A. "Yes."

Q. "I suppose you were not allowed to pick any?" A. "Oh, yes; we used to give me some."

Q. "What fruit?" A. "Currants and rasp-berries."

Q. "Ripe?" A. "Yes."

"This was enough. She was detected at once. The alleged intercourse was in the middle of May. Currants and raspberries are not ripe till June. In this case the woman's whole story was untrue. She had fallen in with the suggestion about fruit to strengthen, as she thought, her account of the garden. But she did not perceive the drift of the questions, and consequently had not sufficient self-command to reflect that the fruit named was not ripe in May." See *Hardwick's Art of Winning Cases*, p. 210.

## CHAPTER 39

### As to Contradictions or Contradictory Statements

When the witness has contradicted himself, the Advocate should not ask him to explain, but should take advantage of the contradiction in his argument to the Jury. If asked to explain, the witness will usually find some satisfactory

explanation even if he is obliged to invent it, take back what he has said, or modify or change it. The observations of Serjeant Ballantine on this point will be found useful: "It will not be out of place here to make some remarks upon cross-examination. The records of Courts of Justice from all time show that truth cannot, is a great number of cases told, be reasonably expected. Even when witnesses are honest and have no intention to deceive, there is a natural tendency to exaggerate the fact favourable to the cause for which they are appearing, and to ignore the opposite circumstances; and the only means known to English law by which testimony can be sifted is cross-examination. By this agent, if skilfully used, falsehood ought to be exposed, and exaggerated statements reduced to their true dimensions. An unskilful use of it, on the contrary, has a tendency to uphold rather than destroy. If the principles upon which cross-examination ought to be founded are not understood and acted upon, it is worse than useless, and it becomes an instrument against its employer. The reckless asking of a number of questions on the chance of getting at something is too often a plan adopted by unskilled advocates, and noise is mistaken for energy. Mr. Barron Alderson once remarked to a counsel of this type—'Mr. ...., you seem to think that the art of cross-examination is to excite the crossly.' " See Wrottesley on the Examination of Witnesses, II Ed., p. 83.

"It is difficult to cross-examine a witness who says that no other person was present, or but one, now dead or far distant, whom therefore it is impossible to contradict, and equally difficult to involve in self-contradiction, because all the circumstances may be true, except the one which he has been called to prove. In such a case there remains only an appeal to the Jury or Judge to look with suspicion upon evidence so easily forged, so impossible to be disproved, and ask that its worth be tried by its intrinsic probabilities, showing, if you can, how improbable it is that such a statement should have been so made, or such a circumstance have occurred." See Cox's Advocate.

It is a mistake to pursue a cross-examination simply for the purpose of getting discrepant or contradictory statements on immaterial or trivial facts. In a case before Mr. Justice Stephen, the learned Judge said: "I think it the greatest waste of time to ask questions in order to get contradictions with regard to conversations. There may be material points upon which it is important to cross-examine. If any two persons were to give an account of the conversation which the two learned counsel have been holding for the last hour and a quarter, there would be, I suspect, a vast difference indeed between their statements." (Harris' Advocacy, p. 59). Cox says: "Beware that you do not fall into the fault, only too common with the inexperienced, of seizing upon small and unimportant discrepancies. Experience teaches us that there are few who can tell the same story twice in precisely the same way, but they will add or omit something, and even vary in the description of minute particulars. Indeed a verbatim recital of the same tale by a witness is usually taken as proof that he is repeating a lesson rather than narrating facts seen. A discrepancy to be of any value in discrediting a witness, must be in some particular which according to common experience, a man is not likely to have observed so slightly as that he would give two different descriptions of it."

### As to Contradictions

"Upon any given point, contradictory evidence seldom puzzles the man who has mastered the laws of evidence, but he knows little of the laws of evidence who has not studied the unwritten law of the human heart, and without this last knowledge, a man will not attain to the practical ideal."—Bulwar.

The advocate cross-examining a witness should conduct his examination with the testimony of other witnesses in view, and endeavour, if possible, to

secure a contradiction by the witness under examination of the other witnesses on whose side he has been called. He should also try to make the witness contradict himself, if he believes that he is lying or is mistaken. No self-respecting advocate will ever try to entrap an honest witness and get him into trouble which may lead to loss of reputation, even if, by doing so, he could win the most important cause. If, however, the witness is not telling the truth, he should be exposed, or, if he is mistaken, his mistake should be explained out of his own mouth, if possible, and if a satisfactory explanation cannot be obtained, the advocate in his argument to the Jury may comment with damaging effect on the mistake. See Wrottesley on the Examination of Witnesses, II Ed., p. 85.

It has become a prominent canon in the law of examination, that a witness cannot be cross-examined as to any distinct collateral fact for the purpose of afterwards by contradiction impeaching the veracity of the witness. To allow an examination of this nature would be to branch out a case into a series of indefinite issues foreign to the one for trial between the parties; and leading perchance to infinite complication and prolixity, and the consumption of more time than it is practicable to bestow on the trial of each cause. Thus in an early and leading case on the subject, an action was brought founded on certain laws against usury, and for the recovery of a penalty alleged to have been incurred under these laws by a contract entered into with the witness. The witness had deposed to a contract, the nature of which according to his representation, exposed it to the charge of usury being as he said, a contract on the footing of a loan, while the case of the defendant was that the contract in question proceeded on that of *partnership*. It was proposed in cross-examination to ask the witness as to other contracts said to have been made on a partnership footing. This was the object: if answered in the *affirmative*, of raising the inference that that was the character of the defendant's contract; or, if in the negative, of contradicting him by the testimony of other witnesses. The question was not allowed to be put, on the ground of the irrelevancy of other contracts to the issue in the cause. *Spencely vs. De Willott*, 7 East. p. 108. It will be observed that in this case the contradiction challenged was in relation to another contract, and a distinct subject-matter, and was so far accordingly treated as wholly irrelevant. In *Attorney-General vs. Hitchcock*, Exchequer, p. 91, such a course of interrogation was treated as allowable in any case in which it was resorted to as a test of the testimony of the witness on the subject of his deposition, provided only it was to be found a case of contradiction on some prior portion of the witness's statement.

Thus it was observed by Pollock, C. B.—“My view has always been that the test, whether the matter is collateral or not, is this; if the answer of a witness is a matter which you would be allowed on your part to prove in evidence,—if it have such a connection with the issue, that you would be allowed to give it in evidence, then it is matter on which you may contradict him. Or it may be as well put, or perhaps better, in the language of my brother Alberson this morning, that if you ask a witness whether he has not said so and so, and the matter he is supposed to have said would, if he had said it, contradict any other part of his testimony then you may call that witness to prove that he had said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness box is not true.” And again: “It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way would contradict a part of the witness's testimony; and if it is neither the one, nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of enquiry. A distinction

should be observed between those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other. It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as to what he has said, not with the view of having a direct effect on the issue, but to show what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed. But those cases where you may show the condition of a witness, or his connection with either of the parties, are not to be confounded with other cases, where it is proposed to contradict a witness on some matter unconnected with the question at issue." *See Goodeves's Indian Evidence Act*, pp. 241—261.

### Contradiction between F. I. R. and Evidence

First information report under S. 154, Cr. P.C. is a very important piece of evidence, any material discrepancy between the statement contained therein and subsequent evidence will entail benefit of doubt to the accused. The decisions on the point are given below :—

The complainant stated in his first information report that his bullocks were missing, but before trial Magistrate he stated that they had been stolen. He paid accused certain money for their restoration. The accused was prosecuted under S. 215, I. P. C. Held, that it was not proved that any offence under Penal Code was committed with respect to the bullocks. 1931 L. 157 : 131 I. C. 369 : 32 Cr. L. J. 729. Where a person's statement in Court is different from one in the F. I. R., conviction cannot be based unless he is corroborated by other witnesses. 1933 O. 148 : 34 Cr. L. J. 498. Three dacoits were mentioned in the F. I. R. Witness stated that six dacoits took part but identified two after 5 years: Held, that accused should get the benefit of doubt. 1935 L. 146. If the statement contained in F. I. R. is inconsistent with any part of the testimony given in Court, it must be put to him in cross-examination to afford him an opportunity of explaining or reconciling the contradiction. 1931 L. 38: 32 Cr. L. J. 522.

Benefit of doubt goes to accused in case of discrepancies between F. I. R. and subsequent evidence. 1931 L. 157, 1923 L. 385, 1922 L. 410, 1933 O. 148, 12 Cr. L. J. 497, 1922 L. 453, 17 Cr. L. J. 147.

### Contradiction between Evidence and Statement to Police

Statements are recorded by the Police during Police Investigation. S. 162, Cr. P. C. provides that accused has a right to contradict the witness by any statement made by him before the Police. As to how much such contradiction can be proved, *see* the following decided cases :— It is only what is written in the Police diaries that can be used under S. 145, Evidence Act, to contradict the witness. The way to prove those portions, specifically put to the witness, is for the accused to mark the passage or passages in the copy from the Police diary supplied to him and then ask the writer of the statement to say that it is a true copy. 1928 L. 507 : 29 Cr. L. J. 343. The only way to contradict a witness is to prove his statement and put it to him under S. 145, Evidence Act, to permit him to explain the contradiction, if any, Statements made to Police cannot be used in any other way. 8 L. 605 : 1928 L. 17. If a witness admits having



made the statement, the previous statement in writing need not be proved. If he denies and it is intended to contradict him, the relevant portions of the record contrary to his statement in Court must be read to him and witness should be given the opportunity to reconcile the same. It is only after this is done that the record of previous statement becomes admissible in evidence and then be proved according to law. 11 L. 460 : 193 L. 491. Where accused is not allowed to cross-examine a witness with reference to certain omissions in his statement to Police and statement in Court, it must be left to the Court to decide, whether in a particular case omission amounts to contradiction. 9 L. 989 : 1928 L. 257. See 58 C. 980, 1932 L. 108 : 135 I. C. 209. If the contradiction consists in this that a statement made at the trial was not made in any part of the statement to the Police, it can be proved 5 P. 346 : 1926 P. 362 : 95 I. C. 396 : 27 Cr. L. J. 796. Statements attested by the Sub-Inspector concerned, although recorded in his diary are recorded under S. 162 and can be used for the purpose of contradicting witnesses in cross-examination. 1927 O. 321 : 28 Cr. L. J. 802. A statement which has been admitted in evidence under S. 32, Evidence Act, may be contradicted by another statement of the same person made to Police during investigation. 1926 L. 122 : 26 Cr. L. J. 1425. A written statement which has been admitted in evidence under S. 32, Evidence Act, may be contradicted by another statement of the same person made to Police during investigation. 1926 L. 122 : 26 Cr. L. J. 1425. It is not permissible to ask investigating officer whether witness stated or did not state to him a particular matter, for a witness can be discredited only by proving what is or what is not contained in the duly proved record of his statement. 1931 C. 622, 56 M. 475, 1928 R. 150, 1928 A. 280, 1928 L. 507, 8 L. 605, 7 L. 264, 6 L. 24 *Contra* 1931 P. 152 : 10 P. 107. But see 1933 P. 580 and 1924 B. 510. A statement under S. 162 cannot be used during an inquiry or trial in order to show that witness is making statements in the witness-box which he did not make to the Police. 1933 M. 372 (2) ; 56 M. 475. 1932 L. 103 and 1926 P. 20 *Rel. on.* 1926 P. 362 *Expl.* 16 A. 207 *Ref.* A witness cannot be confronted with the unwritten record of an unmade statement. All omissions are not necessarily contradictions. 1932 L. 103 (110). 1928 L. 257 : 9 L. 389 *Ref.* Silence may be full of significance but it is not 'diction' and therefore it cannot be 'contradiction'. 1933 M. 372 (2) at page 373 : 56 M. 475.

Disallowing Cross-examination as to the statements which witnesses never made to Police, was to draw the attention of the witness to the omission and seek their explanation, is erroneous. 1933 N. 136 (114) : 34 Cr. L. J. 505, 1931 P. 152 : 32 Cr. L. J. 797, 10 P. 107. Omission of some detail does not mean that it was not stated, because the diaries are notoriously condensed. 1933 P. 440, 1933 P. 589 : 147 I. C. 142. Only those portions of statement to Police are parts of judicial record, as have been actually used under S. 162 for contradicting the witnesses in the manner provided by S. 145, Evidence Act. The other parts cannot be relied upon by prosecution or defence. 1930 L. 449 : 31 Cr. L. J. 199.

Entries in Police diaries can be used for a limited purpose of contradicting the prosecution witnesses. Reference by a Magistrate to Police proceedings cannot be justified even under S. 172. 1928 L. 820 : 109 I. C. 821 : 29 Cr. L. J. 493.

Only a witness called by the prosecution can be contradicted by a Police statement. 8 L. 605 : 1928 L. 17 : 28 Cr. L. J. 983 : 105 I. C. 807.

A statement to Police cannot be used to contradict a defence witness. 1924 B. 510 : 21 Cr. L. J. 223, 4 R. 72, 31 Cr. L. J. 689 : 1930 O. 60, 124 I. C. 444,



or a Court witness 1927 L. 713 : 28 Cr. L. J. 828. But a hostile witness can be contradicted 37 Cr. L. J. 1117.

The proper way to prove omission is to question the Police Officer who wrote the diary, whether a particular statement was made to him. Omission cannot be proved by merely filing the case diary. 1942 M. 58, 1945 C. 159. Unless statement was such that if made it would not have been omitted, statement under S. 162 Cr. P. C. cannot be used for proving omission. 1944 M. 385 : 46 Cr. L. J. 294, 1942 M. 58, 1933 M. 372, 1932 L. 103, 9 L. 389 16 A. 207. For other cases *See* Prem's Criminal Practice 1947 Ed.

## CHAPTER 40

### As to Details

Cross-examination as to unimportant details ought to be avoided. 11 Cr. L. J. 74. If the cross-examiner finds that the witness is drawing upon his memory and ingenuity and that he was not actually eye-witness, he must cross-examine him as to particular details.

### Illustrations

(i) Benjamin Francis Williams, K C., was defending a man for murder. The case for the crown was that the prisoner had come to the house of a witness one evening carrying a sack ; that he had opened the sack, and showed in it the dead body of a man called Jones ; that he had said that he had killed Jones, and was going to bury the body in some waste ground. A year or so afterwards the body was found in the waste ground and the chief witness told his story.

The prisoner was arrested, and the defence was that it was a concocted story and too ridiculous to be believed. The cross-examination of the chief witness proceeded thus :—

Q. "Now you have told us all about the sack and the burial, and told us that when the prisoner left your house he whistled. Do you remember what tune the whistled?" A. "I don't know."

Q. "Let me suggest its name. Was it 'Now we shan't be long ?' (The title of a then popular song). A. "No."

*Counsel* :—"What! You don't know? Well, surely, it must have been."

There was not any further comment on the case ; but the prisoner was acquitted. 20 M. L. J., p. 232.

(ii) The question has often occurred to us whether it is more prudent to show to a witness that you suspect him, or to conceal your doubts of his honesty. Either course has its advantage. By displaying your doubts you incur the risk of setting him upon his guard, and leading him to be more positive in his assertions and more circumspect in his answers ; but, on the other hand, a conscious liar is almost always a moral coward ; when he sees that he is detected, he can rarely muster courage to do more than reiterate his assertion, he has not the presence of mind to carry out the story by ingenious invention of details, and a consistent narrative of the accidental circumstances connected with it. A cautious concealment of your suspicion possesses the advantage of enabling you to conduct him into a labyrinth before he is aware of your design, and so to expose his falsehood by self-contradiction and absurdities.

(iii) The fact that the witnesses do not speak to details too minor to be remembered at a time of excitement does not affect the truth of their testimony. 1935 Oudh 468 : 36 Cr. L. J. 1151.

CHAPTER 41

As to Direction of Sound and Capacity to Hear

A person's right perception of a sound heard by him depends on his situation relative to the sound at the time of hearing, his nearness to or distance from it; also on his capacity to hear. *See Ram on Facts*, p. 16.

Lawyers frequently attempt to induce aged or infirm witnesses to testify that they could hear plainly what was said by defendant, in an ordinary tone, at a distance, say, of forty feet. The lawyer first speaks in loud and distinct tone during the preliminary examination and then suddenly drops his voice in the hope that witness will ask him to repeat the question. This rule usually fails. *See Prisoner at the Bar*, p. 226.

It is necessary to be extremely careful not to accept without verification statements of witnesses concerning the direction, the distance or the intensity of the human voice. The majority of people cannot tell whether a voice comes from above or below, from the right or from the left, from before or behind, from a distance or close at hand; and very few people know how defective their power of observation is in such matters. The reason often is found in the circumstance that a person cannot readily bring himself into touch with the locality, *e g.*, the street of a town, hills in the country, etc. *See Hans Gross*, p. 68.

"Constitutional differences in quickness of hearing, sometimes marked between persons of the same race, are more marked between persons of different races. By putting his ear to the ground a savage hears sounds inaudible to a civilized man." *See Spencer, Principles of Psychology*, p. 80.

Prince Henry tells Falstaff,—*"Peace, ye fat-guts, lie down; lay thine ear close to the ground, and list if thou canst hear the tread of travellers."*

The air of night is more favourable than that of the day for the transmission of sound. Gray puts down in his journal while visiting Keswick and its neighbourhood:—"In the evening I walked down to the lake by the side of Crow-park, after sunset. At a distance were heard the murmurs of many waterfalls not audible in the day time." *Gray's Works*, Vol. II, p. 266.

Frequently it is the later part of what is said that is heard, and not the beginning. A variety of causes may occasion this; as noise at the commencement, the low tone of the speaker's voice at that time, or the circumstances that the hearer's attention was not attracted to the speaker, until he had advanced in what he was saying. *See Ram on Facts*, p. 17.

A person may catch some only of, and not all, the words which another speaks; and the consequence may be that the words caught do not express the speaker's meaning. A ludicrous instance of this is contained in a story thus told by Hume:—"Some young gentlemen of Lincoln's Inn, heated by their cups, having drunk confusion to the Archbishop (Laud), were, at his instigation, cited before the star chamber. They applied to the Earl of Dorset for protection."

"Who bears witness against you?" said Dorest.

"One of the drawers," they replied.

"Where did he stand when you were supposed to drink this health?" subjoined the Earl.

"He was at the door," they replied, "going out of the room."

"Tush!" cried he; "the drawer was mistaken: you drank to the confusion of the Archbishop of Canterbury's enemies and the fellow was gone before you pronounced the last word."

Hooker also says of the eye, that is the "liveliest and the most apprehensive sense of all other;" and he thinks that things presented to the eye are more fit than words to make a deep and strong impression; that actions are better remembered than words, and to this cause, he refers the use of ceremonies performed on many occasions. "We must not think," he says, "but that there is some ground of reason, even in nature, whereby it cometh to pass, that no nation under heaven either doth, or ever did, some public actions which are of weight whether they be civil and temporal, or else spiritual and sacred, without some visible solemnity; the very strangeness whereof, and difference from that which is common, doth cause popular eyes to observe and to mark the same. Words both because they are common and do not so strongly move the fancy of man, are, for the most part, but slightly heard; and therefore with singular wisdom it hath been provided, that the deeds of men which are made in the presence of witnesses, should pass not only with words, but also with certain sensible actions, the memory whereof is far more easy and durable than the memory of speech can be." See Hooker's Eccles. Pol., B. IV, Vol. I of his works, p. 303, Ed. 1822.

Writers, ancient and modern, agree that the eye perceives quicker and better than the ear:—

"The business of the drama must appear,  
In action or description. What we hear,  
With weaker passion will affect the heart.

Than when the faithful eye beholds the part." Ram on Facts, 19.

The direction of the sound is a matter which the witness can never fully determine. The sound which the witness perceives is unconsciously compared to a whole series of memories of sounds previously heard, and he attempts to co-ordinate them in his mind. Locard tells of a man who one night heard a peculiar sound and in the series of confused memories exclaimed, "That dog is not a frog—it is a Carwheel."

A witness is asked to repeat a conversation he has heard. This places him at a great disadvantage.

Identification of a person, who is not known to witness merely by voice is not sufficient for conviction. 1928 L. 925. See Ch. 46 *infra*.

## CHAPTER 42

### As to Discrepancies.

"Cross-examining for small discrepancies in conversation is generally useless; always so merely as a test of veracity. Overlook discrepancies that are not very material, because discrepancies are often the strongest evidence of truth." 11 Cr. L. J. 78-79. There are several discrepancies which though proper to the hilt could not possibly affect the issue on the mind of the tribunal trying it. There is no use of making such or eliciting such discrepancies.

In a case before Mr. Justice Stephen, the learned Judge said: "I think it is the greatest waste of time to ask questions in order to get contradictions with regard to conversations. There may be material points upon which it is important to cross-examine. If any two persons were to give an account of the conversation which the two learned counsel have been holding for the last hour and a quarter, there would be, I suspect, a vast difference indeed between their statements."

"Veracity must be tested by divergencies of statement upon material points, and with reference to matters respecting which the witnesses could

hardly be mistaken. Differences upon other points merely go to memory, closeness of observation, or descriptive power." Harris' Hints on Advocacy, p. 60.

As to what are material and what are immaterial discrepancies. Sergeant Ballantyne says :—" Great discernment is needed to distinguish material from immaterial discrepancies, and never to dwell long upon immaterial matters, but if a witness intends to commit perjury it is rarely useful to press him upon the salient points of the case, with which he has probably made himself thoroughly acquainted, but to seek for circumstances for which he would not be likely to prepare himself. And it ought, above all things, to be remembered by the advocate, that, when he has succeeded in making a point, he should leave it alone until his turn comes to address the Jury upon it. If a dishonest witness had inadvertently made an admission injurious to himself and, by counsel's dwelling upon it, becomes aware of the fact, he will endeavour to shuffle out of it, and perhaps succeed in doing so."

Regarding the reason of the above rule, Cox says :—" Beware that you do not fall into the fault of seizing upon small and unimportant discrepancies. Experience teaches us that there are few who can tell the same story twice in precisely the same way, but they will add or omit something, and even vary in the description of minute particulars. Indeed, a verbatim recital of the same tale by a witness is usually taken as proof that he is repeating a lesson rather than narrating the fact seen. A discrepancy, to be of any value in discrediting a witness, must be in some particular which, according to common experience, a man is not likely to have observed so slightly as that he would give two different descriptions of it. Remember you are dealing with a Jury composed of men who cannot understand refined distinctions, and have no respect for petty artifices and small triumphs over a witness's self-possession or memory, and that you will not win their verdict unless you show that the witness is not puzzled, but lying. Yet how often may this error be seen in our Courts, and verdict lost by the very cunning that was pluming itself upon its ingenuity." Wrottesley, p. 186.

" But it is otherwise with discrepancies of statement. These cannot exist in a truthful narrative. Repeated never so frequently and whatever the variance in detail, the story will always be consistent with itself, and with its former assertions. A positive discrepancy is proof that whatever the cause, whether by design or by the not unfrequent delusion of mistaking imagination for reality, the witness is not speaking the truth, and therefore in such a case, be the motive what it may, an advocate is justified in pointing out this discrepancy to the jury, and asserting that no faith can be placed in a narrative which thus contains within itself decisive evidence that some portion of it, at least, is not true. By bearing in mind the distinction between variances and discrepancies in the repetitions by a witness in the same story, the Judge and the advocate may avoid those contradictions of assertion as to the worth of certain testimony which sometimes shake the confidence of juries in arguments really deserving their consideration and which are equally disagreeable to the speaker and to the commentator. Let the advocate abstain from dwelling upon mere variances, and let the Judge, before he directs the jury the advocate is wrong in his assertions, as cautiously assure himself that the objections that have been urged are not to discrepancies but to differences. *Ibid* p. 182.

" If an attesting witness to a will should testify that he saw the testator sign his name, and should then be asked if he was sure he saw the testator make the very letters which form his name, would not the usual answer be, 'I saw him write letters on the will, and then I attested it.' This was Dr. Lushington's

opinion. 'Lastly,' said that eminent judge, 'put this question—'were you not at the foot of the bed when the testator signed, and will you swear that, as the letters of the name would necessarily be backward to you as you stood, you are sure you saw the letters of the name formed?' Where is the honest witness who would dare to give a positive affirmative answer to that question; especially, too, after the lapse, as in the present case, of more than two years? It would be ridiculous in the Court to expect it; more especially, too, as it very seldom happens that witnesses follow the precise movement of a pen in the hand of a writer." *See Thomson v. Hall*, 2 Rob. Ecc., pp. 426, 435.

"Cross-examination on details that are not important ought to be avoided." Assuming that you prove something by examination of particular details, ask yourself, 'Now, if I prove that fifty times over will that affect the judicial mind or will it affect the minds of the Jury who are finally disposing of this matter?' If it won't, then drop it. Leave it out immediately." 11 Cr. L. J. 74.

"A poor Welsh woman leaving home to attend an annual meeting of the Methodists replied, on being questioned as to the numerical amount of the probable assemblage, that 'perhaps there would be a matter of four millions,'—this in a little open ground that, by no possibility, could accommodate as many thousands." *See Hardwicke's Art of Winning Cases*.

When one person hears another speak, the impression which the words uttered make on the mind of the hearer is frequently not that of the very words, but of the sense of important of them. A witness asked what he heard a person say, does not in reply often mention the particular words, but qualifies them by adding "or something of that sort;" "or some such terms;" "or words to that effect;" "or some expression of that description;" "I don't pledge myself for the exact words, but certainly to that effect;" "I heard A speak to B to this effect. I think, &c." "I do not pretend to state A's words, but the substance, I believe, I am correct in." *See Ram on Facts*, p. 23.

It very often happens that words heard make no lasting impression:—

"I have slight memory of that walk

Argyle, I think, spoke earnestly

On State affairs, but of his talk.

Not any word remains with me," *See Aytown's Bothwell*.

The attention of one witness being directed to one part or position of the subject of inquiry, and of another witness to a different point of view of the same thing, or the witness giving different degrees of attention to a single incident, Courts except there will be a difference at least in the minute of their testimonies, and such divergencies constitute no reasonable basis for discrediting their united testimony to the important facts, but tend rather to enhance the credit of the witnesses. *See Hodder v. Philadelphia Rapid Transit Co.*, 217 Pa. St. 110, 117, 66 Atl. Rep. 289, 242.

It is a well settled rule that conflicting testimony must be reconciled, if it can reasonably be done, without imputing prejury to any witness. *See Moor on Facts*, S. 726. If rights were to be lost as a matter of course because of differences in the perceptive faculties, habits of attention, or the memories of witnesses, in a very large proportion of cases involving wrongs to be redressed, the law would fail to furnish a remedy; and this reproach should be avoided by reconciling conflicts in evidence if it can reasonably be done, and rejecting evidence found to be irreconcilable, if that can reasonably be done, so as to reach a conclusion as to the right of the matter involved. *See Collins v. Janesville*, 117 Wis. 415, 94 N. W. Rep. 309.

### Clearing up by Court

When the Magistrate saw the Police diary and observed that certain discrepancies in the evidence of prosecution witnesses were not material, the conviction must be set aside. 1931 P. 96 : 32 Cr. L. J. 735 (1), 44 C 876. The Police Officers should not try to remove all discrepancies in the evidence of witnesses as originally recorded with the object of presenting to Court a picture of witnesses making consistent and coherent statements. It is absolutely futile. 1935 L. 230 : 35 Cr. L. J. 1180. When two dishonest witnesses tell discrepant stories, Court must clear them. 1930 M. W. N. 169.

### Immaterial Discrepancies

Discrepancies like sitting or standing, facing north or south or who snatched the *dang*, etc., at the occurrence are immaterial. 1923 C. 163. Prosecution evidence should not be rejected on immaterial discrepancies or probabilities. 1923 O. 217 : 24 Cr. L. J. 770, 1933 O. 333. Where illiterate villagers come forward to depose as to evidence which was crowded into their memory for a few moments, any little discrepancy or contradiction should not be taken as a proof of their mendacity. 1931 L. 38 : 32 Cr. L. J. 522. Where evidence for the prosecution has been implicating the accused, he should not merely rely on discrepancies or exaggerations in the prosecution story but must lead evidence. 1928 P. 100 : 6 P. 627 : 107 I. C. 305 : 29 Cr. L. J. 239. A slight change in the statement as to date of birth is not necessarily to be discredited. 1924 O. 385.

Where the discrepancies between witnesses as to dates is not unnatural, it is an indication of *bonafides*. 1930 P. C. 18. There are discrepancies of truth as well as discrepancies of falsehood and too minute attention to immaterial discrepancies may lead to failure of justice. 15 P. R. 1909 Cr. Minor discrepancies will always be found where honest witnesses come to depose. 1933 S. 166 : 34 Cr. L. J. 808. If witnesses are tutored, care is always taken that they tell the same story. Discrepancies are not less informative of testimony, because a greater sagacity on the part of witnesses would have avoided it. 11 B. H. C. R. (Cr. C.) 146. Memory is fallible and whenever two persons attempt without previous arrangement to relate an incident, discrepancies will invariably be discovered. 1935 S. 145 (158) : 1945 A. 100. Minor discrepancies upon immaterial points do not discredit the witness. On the contrary witness should be regarded with suspicion if upon such points as this, no discrepancies can be detected in their statements. 1935 S. 145 (158).

When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. On the contrary a close and minute agreement induces the suspicion of confederacy and fraud. Field's Law of Evidence in British India, 8th Ed., p. xxi of Introduction.

If a person talks over the incidents of some startling accident or other abnormal occurrence to some persons who were also present there, he will find that he observed some things which did not attract the attention of some of his fellow-observers, while some of them have seen matters which escaped his observation. The angle of view at which each observer stands, the objects that more or less intervene, the number of surrounding and distracting circumstances, and the difference between the powers of observation and keenness of sight of different individuals, together with other causes will readily account for this *circumstantial variety*, while all are agreed about the broad incidents of the substantial truth. Experience tells us that a certain variety in detail accompanies and even indicates truth, while a close and minute agreement is significant of conspiracy and falsehood. *Ibid* at p. xxii.

In a case of assault five witnesses described the incident and all detailed the names of the eleven accused *in the same order*. It may safely be said that, without concert, this could not possibly happen. It appeared that the Mukhtar obtained a copy of the complaint made some days previously and, in order to guard effectually against discrepancy, he had made each of the five witnesses *commit it to memory*. Where several witnesses bear testimony to the same transaction and concur in their statement of a series of particular circumstances, there can be only two conclusions—either the testimony is true or the coincidences are the result of concert and conspiracy. To determine which is the case, there are two valuable tests. *First*, are the witnesses independent and acting without concert? *Second*, are the coincidences natural and undesigned? *Ibid* at p. xxii.

In case of *omissions* in the evidence, it will be important to see whether the omission to mention a particular fact arises from wilful suppression or from witness's attention being rivetted upon some other facts, with describing which his mind has been wholly engrossed. If the fact be one which could not possibly have escaped his observation, supposing him to be a true witness, and if, on being indirectly questioned, deny such knowledge, the supposition of inadvertence is scarcely possible, and a discrepancy is apparent. *Ibid* p. xxvi.

### Material Discrepancies

In case of material discrepancies in prosecution story accused gets the benefit of doubt. 1923 L. 195. Statement of a witness in hopeless conflict with his previous one should be rejected. 1925 L. 483: 27 Cr. L. J. 289. In case of discrepancies between first information report and complaint and subsequent evidence, the accused should get benefit of doubt. 188 P. L. R. 1915: 34 P. W. R. 1915 Cr., 92 I. C. 209, 7 L. L. J. 96, 172 P. L. R. 1914. Where material discrepancies occur between statements of corroborating witnesses before the Police and the Court there is no corroboration of approver's story. 11 Cr. L. J. 580. It is not permissible to reject the prosecution story owing to material discrepancies or improbabilities. 1923 O. 217: 24 Cr. L. J. 770: Discrepancies in the statements of witnesses on material points must not be lightly passed over as they seriously affect their testimony. 36 A. 187. Where material discrepancies exist between the statements of corroborative witnesses before Police and the Court there is no corroboration. 35 P. W. R. 1910 Cr.

Expression of opinion that discrepancy between complaint and subsequent evidence does not affect prosecution case is misdirection. 1934 C. 77: 35 Cr. L. J. 483.

Discrepancy between statements of approver and witness cannot be explained away by reference to statements before Police. 1931 L. 102: 35 Cr. L. J. 517.

## CHAPTER 43

### As to Hearsay Evidence

S. 60, Indian Evidence Act, provides that oral evidence must, in all cases whatever, be direct; that is to say—if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable: Provided also, that if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection. See S. 60, Ev. Act.

"The term 'hearsay,' being used in more than one sense, is misleading and has not, for that reason, been used in this section. In its more generally accepted sense, the term 'hearsay' is used to indicate that evidence which does not derive its value from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person." See Taylor, S. 570. "Oral or written statements made by persons not called as witnesses are inadmissible to prove the truth of the matters stated, except when such statements become relevant under some section of the Act as exceptions to the rule against hearsay." See Phipson, 7th Ed., 212. "Thus, a statement of an officer of the Motor Vehicles Department contained in a letter in reply to an inquiry is mere hearsay and not evidence, unless the officer himself appears in Court to depose to the contents of the letter." 1933 C. 178.

Statements made by persons not examined as witnesses may in some cases amount to "original" as distinguished from "hearsay" or "derivative" evidence, e. g., statements which are part of the *res gestae*, (S. 6, Ev. Act); whether actually constituting a fact in issue, as a libel or a contract, or accompanying and explaining a fact in issue, as the cry of the mob during a riot; statements expressing knowledge, intent, or mental or bodily feeling, (S. 14, Ev. Act); statements amounting to acts of ownership, as leases, licences, and grants, (S. 13, Ev. Act); complaints in cases of rape; statements constituting motive (S. 8, Ev. Act). The admissions of a person whose position in relation to the property in suit it is necessary for one party to prove against another under S. 19 are in the nature of original evidence and not hearsay, though such person is alive and has not been cited as a witness. 5 M. 239. Similarly, a statement made by an accused person immediately after the commission of the offence may be relevant as showing his state of mind; but where that statement is a repetition of what somebody else said to him, the latter statement is mere hearsay and thus inadmissible unless proved by the evidence of a person who heard it. 81 I. C. 717: 1924 L. 733: 25 Cr. L. J. 1005.

The rejection of hearsay is based on its relative untrustworthiness for judicial purposes owing to (i) the irresponsibility of the original declarant, whose statements were made neither on oath, nor subject to cross-examination; (ii) the depreciation of truth in the process of repetition; and (iii) the opportunities for fraud its admission would open; to which are sometimes added, (iv) the tendency of such evidence to protract legal inquiries, and (v) to encourage the substitution of weaker for stronger proofs. See Taylor S. 570, Best S. 492, Phipson, p. 215.

As to the inadmissibility of hearsay evidence the following decisions of various High Courts will be found useful:—

In India, it is most dangerous to accept vague statements of hearsay information. Often it so happens that what a man hears, he believes that he saw it himself. 1924 O. 187: 24 Cr. L. J. 791. It is admissible evidence for



## CROSS-EXAMINATION

a living witness to state the opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay. 23 A. 37 (51). Under the Evidence Act hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed. 1926 M. 1003; 24 M. L. W. 227. Hearsay evidence amounting to evidence of general repute is admissible in proceedings under Chapter VIII of Cr. P. C. (security cases), 6 Bom. L. R. 34, 6 B. 34, 2 P. W. R. 1909 Cr. Hearsay is always inadmissible as substantive evidence whether that evidence be elicited in examination or cross-examination. But hearsay may be admissible in cross-examination in so far as it touches the question of the credibility of the witness examined. 16 C. 210. Former statements of a person giving the date of his own birth are admissible under the combined operation of Ss. 21 (1), 32 (7) and 13 (a), Evidence Act, but they do not possess any probative force because of the source of his information being only hearsay. 213 P. L. R. 1910: 7 I. C. 505. The moment a witness commences giving hearsay or other inadmissible evidence, he should be at once stopped. It is not safe to rely on a subsequent exhortation to the jury to reject hearsay evidence and to decide on legal evidence alone. 7 W. R. Cr. 25. The evidence of a witness that complainant identified the articles which were recovered is inadmissible as hearsay. 1924 L. 727: 25 Cr. L. J. 1347. Deceased made a statement prior to her death as the motive of the accused. Held, it could not be proved by hearsay evidence, by the testimony of a witness who heard her make the statement. 54 M. 931: 1931 M. 689: 33 Cr. L. J. 51. When the evidence of witness is hearsay, it is not relevant and should be disregarded. 2 C. W. N. 193. When hearsay evidence is improperly admitted, the question for the appellate Court is whether rejecting that evidence, enough remains to support the finding. 6 B. L. R. 495. A deposition containing hearsay evidence cannot be transferred under S. 228, Cr. P. C. 3 P. 781: 1925 P. 51: 26 Cr. L. J. 270. A statement by a witness that some one not produced as witness had informed him as to the disposal of body by the accused is hearsay. 33 Cr. L. J. 637. Statement made by an accused immediately after the occurrence is relevant as showing his state of mind but when that statement is a repetition of what somebody else said to him, the latter statement is hearsay, unless proved by the evidence of a person who heard it. 1924 L. 733: 25 Cr. L. J. 1005: 81 I. C. 717. The evidence of investigating officer that one of the accused is known by a different name is hearsay if his information is derived from others. 29 Cr. L. J. 449.

Evidence of identification proceedings is, in substance, evidence of statements made by witnesses in the course of investigation. They are hearsay and are not substantive evidence. They can be used merely to corroborate or contradict. 27 Cr. L. J. 813: 95 I. C. 477.

Evidence of what complainant stated to the witnesses as having been done to the accused is inadmissible as hearsay if the complainant goes back upon the story told by him to the witnesses. 13 C. L. R. 125.

Report of an expert is merely hearsay. 1923 A. 601, 1924 N. 183.

A statement in a newspaper is merely hearsay. 1925 L. 299.

The opinion and impression of a witness that assembly appeared to be unlawful is only hearsay. 1928 P. 98: 105 I. C. 234.

## Illustration

The following anecdote relating to the value of common report is told of John Wesley:—"John had a curious interview there (Bath) with Beau Nash,

for it was his reign. While he was preaching, this remarkable personage entered the room, came close to the preacher, and demanded of him by what authority he was acting. Wesley made answer, "By that of Jesus Christ, conveyed to me by the present Archbishop of Canterbury, when he laid his hands upon me and said, 'Take thou authority to preach the Gospel.'"

Nash then affirmed that he was acting contrary to the laws: "Besides," said he, "your preaching frightens people out of their wits."

"Sir," replied Wesley, "Did you ever hear me preach?"

"No," said the Master of the Ceremonies.

"How then can you judge of what you never heard?"

Nash made answer, "By common report."

"Sir," said Wesley, "is not your name Nash? I dare not judge of you by common report; I think it is not enough to judge by." See Southey's *Life of Wesley*, Vol. I.

## CHAPTER 44

### As to Identification of Animals.

Identification of animals, though difficult, is not possible.

There are peculiarities in animals from which one can recognise them. 25 P. R, 1883 (Cr.) Identification of animal by freshly flayed skin is suspicious. 29 I. C. 72 : 16 Cr. L. J. 440. As a rule fore-hoof of a horse is rounder and more confined, whilst the rear-hoof is more elongated and more open. The size and shape of the shoes, the number of the nails and the distance from one another, etc., are often so characteristic that their impressions may very well serve to establish identification. Criminal Investigation by Dr. Hans Gross, Ed. 1934. See 5 L. 396 : 1925 L. 19 : 27 Cr. L. J. 170.

Undoubtedly animals and things may be identified by those familiar with them by the noise they make. Observation teaches that identification in this manner may often be safely established. 37 N. W. Rep. 153, 180 Mass. 492. It is in experience that dogs can be recognized by their owners in pitch dark night from a great distance by their peculiar barking, even if the owner does not actually see them. 180 Mass 492. On the whole identification of animals is not so easy as that of men or women. The risk is that every individual has got some peculiar features, size, gait, etc., and he can always be made out by those who often see him. But in the case of animals the question of features does not arise. They can only be identified by persons who generally attend them.

### Illustrations.

(i) It is well known that shepherds readily identify their sheep, however intermingled with others and offenders are not unfrequently recognized by the voice. Syme's *Justiciary Report*, p. 284. Will's *Circumstantial Ev.*, 6th Ed., p. 190.

(ii) A darvesh was journeying alone in a desert when two merchants suddenly met him.

"You have lost a camel?" said he to the merchants.

"Indeed, we have," they replied.

"Was he not blind in his right eye, and lame in his left leg?" said the darvesh.

"He was," replied the merchants.

"Had he not lost a front tooth?" said the darvesh.

"He had," replied the merchants.

"And was he not loaded with honey on one side and wheat on the other?"

"Most certainly he was," they replied; "as you have seen him so lately, and marked him so particularly, you can, in all probability, conduct us on to him."

"My friends," said the darvesh, "I have never seen your camel, nor even heard of him, but from you."

"A pretty story, truly," said the merchants, but where are the jewels which formed a part of his cargo?"

I have neither seen your camel, nor your jewels," repeated the darvesh.

On this they seized this person, and forthwith hurried him before the Qazi, where, on the strictest search, nothing could be found upon him, nor could any evidence whatever be adduced to convict him, either of falsehood or of theft.

They were then about to proceed against him as a sorcerer, when the darvesh, with great calmness, thus addressed the Court :—

"I have been much amused with your surprise, and own that there has been some ground for your suspicions but I have lived long, and alone; and I can find ample scope for observation, even in a desert. I knew that I had crossed the track of a camel that had strayed from its owner, because I saw no mark of any human footstep on the same route; I knew that the animal was blind in one eye, because it had cropped the herbage only on one side of its path; and I perceived that it was lame in one leg, from the faint impression which that particular foot had produced upon the sand; I concluded that the animal had lost one tooth, because wherever it had grazed, a small tuft of herbage had been left uninjured in the center of its bite. As to that which formed the burden of the beast, the busy ants informed me that it was corn on the one side and the clustering flies that it was honey on the other."

(iii) A farmer, though severely cross-examined, remained very positive as to the identity of some ducks which he alleged had been stolen from him. "How can you be certain", asked the counsel "I have some ducks of the same kind." "Very likely," was the cool answer of the farmer "those are not the only ducks I have had stolen." See P. L. R. (1908) Jour., p. 72.

## CHAPTER 45

### As to Identification of Dead Body

Identification of a dead body is possible only if it has not reached the advanced stage of decomposition. Although the body is decomposed it can be identified by means of clothes, age, height, etc. 1923 L. 40 : 25 Cr. L. J. 783, 15 P. W. R. 1915. Where the head is cut off and the rest is swollen, identification by looking at the photograph is not reliable. 9 Mysore L. J. 142.

### To Determine Sex.

When the entire body is available there is no difficulty in determining the sex. When mutilated fragments of a body or only bones are available for examination, the following are the more important sexual characteristics of the skeleton in the female :—(i) The bones are smaller, thinner and lighter and muscular attachments less prominent than in the male. (ii) The pelvis is shallower, wider, ilia more expanded, sacrum more concave than the male (where it is straighter), the symphysis shorter, pubic arch wider, with edges more diverted, foramina more triangular and outlets larger than in the male. (iii) The ribs have a greater curvature than in the male. Lyon's Med. Jur., Ed. 1904, p. 32. As to Regeneration Process for making the decomposed bodies capable of identification. See *Prem's Law and Methods of Police Investigation* 1947 Ch. 29, P. 339.

## Illustrations.

(i) In a case of murder a witness was pressed, with the following results :—In this case the question was to what sex the deceased belonged.

Q. "Do you mean to say you know the deceased by her clothing?"

A. "Yes, I know every garment she wore."

Q. "But do you mean to say you know the deceased person was the woman?" A. "Yes."

Q. "How do you know her?" A. "By her features."

Sentence : Death.

(ii) In the case of murder of Harriet Smith, a girl servant, it was clear that no charge of murder could be proved without identification. The authorities boldly made a dash for the capital charge, in the hope that something might turn out. And now, driven to their wit's end, old Mr. Smith was examined by one of the best advocates of the day and this is what he made of him :—

Q. "You have seen the remains?" A. "Yes."

Q. "Whose do you believe them to be?" A. "My daughter's, to the best of my belief."

Q. "Why do you believe them to be your daughter's?"

A. "By the height, the colour of hair and the smallness of the foot and leg."

That was all, and it was nothing. But there must needs be cross-examination if you are to satisfy your client. So the defendant's advocate asks :—

Q. "Is there anything else upon which your belief is founded?"

A. "No."

There is a breathless anxiety in the crowded Court, for the witness seemed to be revolving something in his mind that he did not like to bring out.

"Yes," he said, after a dead silence of two or three minutes. "My daughter had a scar on her leg."

There was sensation enough for the drop scene. More cross-examination was necessary now to get rid of the business of the scar and some re-examination too. The mark, it appeared, was caused by Harriet's having fallen into the fire-place when she was a girl.

Q. "Did you see the mark on the remains?" A. "No, I did not examine for it. I had not seen it for ten years."

There was much penmanship on the part of the officers for the Crown, as many interchange of smiles between the officials as if the discovery had been due to their sagacity ; and they went about saying, "How about the scar?" "How will he get over the scar?" "What do you think of the scar?" Strange to say, the defendant's advisers thought it prudent to ask the Magistrate to allow the doctors on both sides to ascertain whether there was a scar or not, and stranger still, while giving his consent, the Magistrate thought it was very immaterial.

It proved to be so material that when it was found on the leg, exactly as the old man and a sister had described it, the doctors cut it out and preserved it for production at the trial.

The sentence was death.

(iii) In a case of murder, in which a witness had sworn to the body of the deceased by certain work he had done to the dress in which the body was clad, the question was asked :

Q. "Do not all dress-makers sew pretty much alike?" A. "Yes."

## CROSS-EXAMINATION

Q. "How, then can you say this work is yours?" A. "Because, I know my work from everybody else's."

## Identification of Skeletons

In the famous trial of Harry Dobkins held in November 1942 for the murder of his wife, the remains of the deceased were found on 17th July 1942, whereas the murder was committed on 12th April 1941 *i. e.*, after a lapse of 15 months. It was a remarkable example of reconstruction carried on in a Scientific manner. The skeleton was fully identified as that of Mrs. Dobkins and the Prisoner was hanged. The examination-in-chief of Dr. Simpson is both illuminating and instructive:—

Q. Cedric Keith Simpson, you are a registered medical practitioner and a pathologist? A. Yes.

Q. On the 18th July last did you visit Southwark Mortuary, and were certain remains pointed out to you by Divisional Detective Inspector Hatton? A. Yes.

Q. Did you examine those remains before they were removed? A. Yes.

Q. From your examination of them at the mortuary did you form an opinion as to how long death had taken place before the examination? A. Yes, I formed the view that death had taken place some 12 to 18 months prior to that date.

Q. If we look at the book of photographs, Exhibit 4, page 1, are those photographs a fair representation of what you saw at the mortuary? A. Plate No. 1 is a representation of them.

Q. Did you remove the remains to Guy's Hospital for further examination? A. Yes.

Q. And later on the same day did you visit the house 302 Kennington Lane with Inspector Keeling? A. That was at 11-30.

Q. Were you there shown the cellar and the position in which the remains had been found? A. Yes.

Q. Were you also shown a stone slab? A. Yes. I think the date on which I visited the cellar is wrong. It was on the 25th.

Q. The 25th July? A. Yes. I visited the cellar at 11-30 in the morning. Mr. Justice Wrottesley: You were there on the 18th? A. No, my Lord; I saw the remains on the 18th, and I first visited the cellar at 11.30. a. m. on the 25th.

Mr. Byrne: Yes; the date is wrong in our copies.

Mr. Justice Wrottesley: I want to be clear about this. You had seen the remains on the 18th at the mortuary? A. Yes.

Q. And you then and there formed the opinion that death had occurred 12 to 18 months before? A. Yes, my lord.

Q. You may as well deal with this at once: Do you absolutely exclude the possibility that the remains had been there for 50 years? A. Altogether, my Lord.

Mr. Byrne: Dealing with the matter my Lord has raised, if in fact a body had been buried as long as 50 years, would you expect to find any tissues at all? A. No.

Q. And in fact in this case were there tissues? A. There was a large amount of soft tissue.

Q. On the 25th July you visited the premises, the cellar was pointed out to you, and you were shown the position in which the remains were found? A. Yes.

Q. You were also shown a stone slab. Then did you visit the premises again after that date? A. Yes, I visited the premises again on July 27th and 28th.

Q. Upon those occasion did you examine a quantity of earthy debris removed from the position in which the remains had been found? A. Yes.

Q. Did you examine it by passing it through a sieve? A. Yes, it was sieved in my presence.

Q. You wanted to ascertain whether there were any other human remains thereabouts, did you? A. Yes.

Q. In fact, did you find any? A. I found none.

Q. You told us that the remains were taken from Southwark Mortuary to Guy's Hospital, and you carried out a further examination? A. Yes.

Q. Did you confirm the time that you had already decided was, in all probability, the time when death had been met? A. Yes, further examination confirmed that original opinion.

Q. With regard to the head and the trunk of the body, were they complementary? A. Yes.

Q. In fact there was complete decapitation, was not there? A. Yes, the head was severed from the trunk, but they were complementary; that is to say, they fitted each other.

Q. Is that shown upon page 9 of Exhibit 4? A. Yes, Plate 12 on page 9 shows the joint between the skull and the upper end of the spine.

Q. You have marked upon that with red ink a line pointing to the joint? A. Yes.

Q. Had the tissues been stripped from the head? A. Yes, almost completely.

Q. Did that mean that most of the parts by which identification might have been established were not present? A. Yes.

Q. Was the upper jaw intact? A. Yes.

Q. But the lower jaw was missing, was it not? A. The lower jaw was missing.

Q. Not only had there been decapitation, but had the arms and the legs also been severed? A. Yes, the left arm had been severed at the elbow joint, and the right arm immediately above the elbow joint, the left leg just below the knee joint, and the right leg at the knee joint.

Mr. Justice Wrottesley: Which means that this body had been cut up? A. Yes, my Lord.

Mr. Byrne: From what you saw, had the severance of those limbs, the arms and legs, been performed by anybody with knowledge of anatomy? A. No, I formed the view that it had been performed by somebody without knowledge of anatomy? A. No, I formed the view that it had been performed by somebody without knowledge of the anatomy of the parts.

Q. Will you look at page 1 of the book of photographs, Plate 2? That is a photograph of the reconstructed remains? A. Yes.

Q. You mentioned a little earlier in your evidence that a considerable quantity of soft tissue was still present on the trunk of the body. A. Yes.

Q. Did that tissue include the uterus, the womb? A. The two most important pieces of soft tissue left were a fragment of the scalp at the back of the head and uterus, which established the sex—the womb which established the sex.

Q. Did you examine the womb? A. Yes.

Q. And find it contained a fibroid tumour? A. Yes.

Q. I think that is shown in this book of photographs on page 8 ? A. Yes.

Q. Then did you yourself draw the diagram which is also upon page 8 ? A. Yes, that shows the composite parts of the photograph above.

Q. The vagina, the body of the womb, and the fibroid tumour ? A. Yes.

Q. You say that you were able to determine the sex in that way. You say that the scalp was entirely removed, with the exception of a small fragment which lay at the centre of the back of the head. Is that right ? A. Yes.

Q. Did that contain hairs ? A. Yes, there was a number of hairs in this fragment of the scalp.

Q. Were they human hairs ? A. Yes.

Q. Could you ascertain the colour ? A. Yes, they were dark brown, many of them going grey,

Q. Did the body show signs of having been burned ? A. Yes, there were burns down the left side of the body in particular.

Mr. Justice Wrottesley : We have dealt with the uterus as determining the sex. Underneath Plate 2 you have got a note about the burned parts. A. The burned parts were down the left side of the body, and involved the left side of the head, the skull, the left hip prominence, the hip girdle prominence, and the sides of both knees.

Q. Now look at your photograph Plate 2. There are various notes there, stars that appear at the top and indicate by lines the burned parts which you have been describing ? A. Yes.

Mr. Byrne : You have got a note there : " Note also curve of neck and upper spine. See X-ray." What does that mean ? A. The neck was somewhat curved, and there was no disease present to account for this.

Q. What do you mean by " See X-ray " ? A. I was present when an X-ray of that part of the body was taken in order to determine whether or not disease accounted for this bending forward of the neck.

Q. We have no photograph of the X-ray examination, but what you mean is that you were present, and therefore you ascertained that there was no disease to account for the curving ? A. Yes.

Q. What importance do you attach to the fact that there is a curving and that there is no disease to account for it ? A. I thought it was possible that there had been some effort, some attempt, to shorten the dimensions of the body for the purpose of concealment or burial, and that in addition to the arms and legs which had been severed the neck might also have been bent.

Mr. Justice Wrottesley : There might have been some bending of the neck ? A. Yes, my Lord.

Q. To cram the body into a smaller space ? A. Yes, my Lord.

Q. Anyhow, there was no disease to account for the bending of the neck ? A. No, my Lord.

Mr. Byrne : In your opinion, could those various points of burning that you indicate in Plate 2 on page 1 have been caused by the exposure of the whole body to a single centre of fire ? A. No, I formed the view that they were caused by exposure of the body to several centres of fire, because of their distribution.

Q. Did you find a powdered yellowish-white deposit present ? A. Yes, it was present in some quantity, in particular around the neck and the shoulder parts of the body.

Q. Was a sample of that handed to Dr. Ryffel, and is that Exhibit 12 ? A. Yes that is a sample of it.

Q. Later did you secure from Inspector Keeling another sample of Exhibit 14 taken from the cellar of No. 302 Kennington Lane? A. Yes.

Q. And another sample, Exhibit 13? A. Yes.

Q. That is from the house; and did you also hand those two samples to Dr. Ryffel? A. Yes.

Q. What would be the effect of slaked lime, or the substance which was originally placed round the body, upon the tissues of the body? A. Its general effect would be to preserve the tissues from being eaten away by maggots and beetles, and so on, after burial.

Q. You say that the biggest deposit was upon the head and neck? A. Yes.

Q. Hence the greatest amount of preservation found there? A. Yes.

Q. Did you find any indication that the body had been buried? A. Yes, it was covered with earthy debris, an earthy substance.

Mr. Justice Wrottesley: The parts you examined had an earthy substance over them? A. Yes, my Lord; when I saw the body as shown in Plate 1 of Exhibit 4, it was covered to that extent with debris, with an earthy substance.

Q. A skin of earth over what you saw? A. Yes, as if it had been removed from earth, from complete burial in earth.

Mr. Byrne: As to the identification of the body, I want to deal with that. You told us first of all that you were able to determine the sex. That was comparatively simple, was it not? A. Yes.

Q. Then did you determine how tall the woman had been? A. Yes.

Q. How did you arrive at that? A. I did it by two methods, the first by reconstructing so far as was possible the body as shown in Plate 2 and making due allowance for the missing parts, the joints at the knee and for flesh and the feet, and by those means I estimated the height to be 59½ in.—that is to say, ½ in. short of 5 ft.—and adding to that the normal conditions for flesh, scalp and feet, I estimated the height to be about 5 ft. 0½ in. to 5 ft. 0¾ in.

Q. Roughly, about 5 ft. 0½ in? A. Yes.

Q. In arriving at that conclusion did you make use of the data that you have upon page 2 of this book, the estimation of stature? A. Yes. The data on page 2 consist of figures by which I arrived at the estimation of stature, by that and another means, the use of established tables for the estimation of height. I did this by two methods: by using the Pearson's formulæ I estimated the height to be 5 ft. 0½ in. to 5 ft. 1 in., using the left humerus, the left upper arm-bone, and by using the Rollet's tables, which are not so accurate, in my view, I estimated the height to be 4 ft. 10½ in. to 4 ft. 10 in. The mean of those estimations from both methods gives a height estimation of about 5 ft. 0½ in.

Q. The next thing was the age. How did you arrive at a conclusion with regard to that? A. I estimated the age first by taking X-ray photographs of the bones represented on page 4 of Exhibit 4, which show adult bony structures with the centres of the bone formations united with the shafts of adult architecture. Then to narrow the age more closely I examined the unions between the bones of the vault of the skull and of the roof of the mouth.

Q. That is shown on page 3, is it not? A. Yes, that shows in the upper photograph on page 3 a united union, a united joint, between the two flat bones of the brow region of the skull; and on the lower part of the photograph a union between the two top plates of the skull just commencing, but not yet complete, and no union between the front top plates of the skull, as shown on each side. By that means I estimated the age to be somewhere between 40 and 50 years. The condition of the roof of the palate, which is shown in the lower photograph on page 3 bears out the opinion expressed from an examination of the top of the



skull ; the conditions are the same, and suggest an age of somewhere between 40 and 50.

Q. The next thing with regard to identity that I will deal with is the superimposition of the photograph of her face upon the photograph of the skull. A. Yes.

Q. That, we know, was done by Miss Newman, and I think you examined it? A. Yes.

Q. What did you find about it? A. I found that the plate on page 6, which was the finished product, showed a large number of points by which it could properly be assumed that this skull shown on page 5 was the skull of the woman photographed in Plate 7 on the lower part of the same page. The general contour of the skull was the same, allowing for scalp thickness; the contour of the cheeks, also allowing for flesh, was the same; the position and shape of the upper jaw fitted the photograph well, was the same; the position, the height, and the width of the orbits, the eye sockets, were the same; the position, the height, and the width of the nose space were the same, and fitted perfectly.

Q. The next thing was the upper jaw. You examined the upper jaw, did you? A. Yes. I found in the upper jaw that there were four teeth remaining, three on the right side, the 6th, 7th and 8th on that side, the 8th being the last tooth in the jaw; and one on the left side, the 6th.

Q. That is shown on page 7, is it not? A. That is shown on page 7 as a photograph of that lower part, and as a line drawing in the upper part made by myself from a photograph of the drawing of the upper jaw made by the dental surgeon who attended Mrs. Dobkin.

Q. The dental surgeon's name was Mr. Kopkin? A. Yes.

Q. He, before seeing the jaw, made a plan, did he not, from his knowledge of the jaw, from the medical attention that he had given her? A. Yes. At 11.45 on August 3rd I met Mr. Kopkin, the dental surgeon, at Guy's Hospital. He had already then made this plan from his records.

Q. That is what I was asking; he made the plan, and then he met you and after that examined the jaw? A. I subsequently showed him the jaw.

Mr. Justice Wrottesley: Were these things found in the same position? One is a pencil drawing and other a photograph. Do they purport to show the jaw placed in the same position, the pencil drawing and the photograph, or are they put back to back? A. The upper is a folded facsimile of the lower. In that way the two sides have come to lie on the same side of the photograph; the right side lies near the hinge of the photograph, and the left side . . .

Q. That is, if you did it *that way*? A. That is so. I found also in the four teeth which remained three fillings. There were fillings on the left side, in the single tooth which remained, the 6th, and fillings on the right side, in the No. 6 tooth, No. 7 containing a cavity from which the filling had fallen, had come away.

Q. No. 6 on the right side; is that it? A. No. 6 on both sides, my Lord, still contained the fillings; and No. 7, the middle tooth on the right side, contained a cavity which had been filled, but from which the filling had fallen away. I also found a remarkable degree of thickening of the upper jaw in the neighbourhood of the back teeth, a very remarkable degree of thickening in the region of the back teeth.

Q. A remarkable amount of thickening? A. Thickening of the bone of the upper jaw in the region of the back teeth. Examination also showed one other condition to which the detail from the records of Mr. Kopkin also drew attention; that was the remains of the roots of teeth 4 and 5.

Q. The what? A. The remains of the roots of teeth Nos. 4 and 5 on the left side. There was one other abnormality; the palate, the hard roof of the mouth, was narrow and high.

Mr. Byrne: Is that unusual? A. It is a feature which does not occur in every jaw, and which would add to the number of details by which an individual jaw might be identified.

Q. You saw Mr. Kopkin's diagram, did you not? A. Yes.

Q. It is Exhibit 15, if you will just look at it again. A. It was from this that I prepared the facsimile shown in the upper part of page 7.

Q. There are no copies of that. Exhibit 15 you compared with the jaw too. Is that right? A. Yes.

Q. And found many instances in which they corresponded? A. In every one of those details which I have mentioned they corresponded precisely.

Mr. Justice Wrottesley: The jaw corresponded with the diagram provided for you by Mr. Kopkin? A. Yes, my Lord.

Mr. Justice Wrottesley: He was her dentist. We are going to see him, are we?

Mr. Byrne: Yes, my Lord.

Q. Are you a pathologist and Lecturer on Forensic Medicine to Guy's Hospital? A. Yes.

Q. I had concluded my examination of you with regard to the identification of these remains. I should like you now, if you would be good enough, to summarize it. How many points of proof with regard to identification did you find from your examination? A. I gave in evidence yesterday 24 separate points of proof.

Q. Will you just quite shortly enumerate those points? A. Yes. They were the sex, the stature, the height, the estimated age...

Mr. Justice Wrottesley: As to that, you say that they tally. You can say it was not a woman of 30. If so, there is an end of this case. A. Yes.

Q. It was not a woman of 65. If so, there is an end of this case. You are able to bring it into some group? A. Within an exact-group of ten years.

Mr. Byrne: 40 to 50. A. Yes. Then there was the presence in the womb of a fibroid tumour, the various features of identification established by the superimposition of photographs...

Mr. Justice Wrottesley: That is the face and skull? A. Yes, my Lord—the hair, the number of teeth left in the jaw, the number of fillings left in the jaw, the roots of previous extractions left in the jaw...

Q. Remind me of that. How many roots did you find? A. There were two remaining roots, my Lord—the thickened condition of the bones of the upper jaw, the state of the palate, the shape of the palate of the upper jaw. Those are the conditions, my Lord.

Q. It is not the mere number of teeth, is it? I thought it was more than that. How many teeth are there in a full complement of teeth in the upper jaw? A. 16 my Lord. I imply that by the number which is there, and the situation, my Lord, the number and situation of the fillings.

Q. If your information is right which you derived from records? A. Yes, from records.

Mr. Byrne: The records of Mr. Kopkin, which he is going to deal with.

Mr. Justice Wrottesley: If that is right, you have got exactly the same teeth out of the 16 in both cases? A. Yes, in exactly the same places.

Q. And their number? A. Yes.

## CROSS-EXAMINATION

Q. Number and situation of teeth. Does that apply to the roots of the teeth? Were the records shown to you where those roots would be? A. Yes, my Lord, the number and situation of the remaining roots.

Q. And the fillings? A. Yes, my Lord.

Q. Fillings are what we sometimes call stoppings? A. Yes.

Mr. Byrne: Those are 11 points that you have mentioned. A. The remaining points which raise them to 24 consist of the separate features of identity which I described yesterday in the superimposed photograph. They are subsidiary features.

Mr. Justice Wrottesley: Those are the details in which the skull corresponds to the photograph? A. Yes, my Lord; and there is not one, but three fillings; and not one, but four teeth. Those provide four and three abnormalities.

Mr. Byrne: So that those 11 main headings, so to speak, which seem to sub-divide, become 24? A. Yes.

Q. Upon the question of identity. So much for that aspect of the matter. Now, when you made your examination did you find certain injuries? A. Yes.

Q. Now I want to deal with those. A. I found the injuries already described: the detachment of the head, the forearms and hands and the lower legs, inflicted after death, and the conditions of burning, also, in my view, inflicted after death; and I found, in addition to those injuries inflicted after death, two injuries inflicted before death, sustained before death. Those two injuries sustained before death consisted of, first, an injury to the voice box; the upper horn of the right wing of the voice box was fractured, *this* part of the bone being thrust inwards towards the windpipe.

Q. That is shown, is it not, on page 11 of the book Exhibit 4? A. Yes. The lower right-hand part of this photograph shows at its upper end a projection which is bent as the result of fracture, the proper position of this being shown as a line drawing.

Q. Bent back, so to speak, out of line.

Mr. Justice Wrottesley: You see what the drawing is telling us, members of the jury: Here there is a little pencil drawing corresponding, as it looks to me, to the one on the other side. A. That is so, my Lord. That is its natural position.

Q. When you found it, that was broken back? A. It is in fact bent inwards. It is difficult to represent that.

Q. Could you help me by indicating where the voice box is on your own face? A. Yes, the bony part, the Adam's apple part, of the windpipe. I found evidence to prove that this occurred in life; microscopical examination of the tissues surrounding this bone confirmed the development of bruising. This had been preserved by the action of the lime. The degree of bruising which I found could only occur in life.

Mr. Byrne: Did you form an opinion as to how that injury had been caused? A. Yes, I formed the view that this was the result of strangulation by the hand, as this type of fracture, existing alone, occurs only under those circumstances, in my experience.

Mr. Justice Wrottesley: Only by being strangled by hand? A. Yes, my Lord.

Q. That is to say, there was not damage all round; it was not as if somebody had been hit by a motor-car? A. No, my Lord.

Q. That is what you mean by "standing alone"? A. It is the fact that it is confined to a very small area, such as might be the result of pressure from finger or thumb.

Mr. Byrne : Would it require little or much pressure to cause that fracture ?

A. It would require very considerable pressure, sufficient, if enough to fracture the bone, also to cause fatal asphyxia.

Mr. Justice Wrottesley : Say that again, doctor. A. Sufficient, if enough to fracture this bone, also to cause a fatal degree of asphyxia.

Mr. Byrne : That completes the matter, does it, with regard to that first injury sustained before death which you found ? A. Yes.

Q. Now we pass on to the second one sustained before death. A. The second injury sustained before death is shown on page 12. It consisted of a broad area of bruising over the back of the head, in the centre of which a fragment of scalp lay crushed against the skull. This was the fragment of scalp containing hair.

Mr. Justice Wrottesley : Did you form any opinion as to why the rest of the skull was disturbed or disfigured ? A. Yes, I formed the view that it had been stripped.

Q. Taken off for the purpose, do you mean ? A. Yes, my Lord.

Q. By hand ? A. Yes, my Lord.

Q. It could not have been done by fire or lime ? A. No. The difference between the condition of the skull and that of the rest of the body was remarkable. The skull was quite devoid of soft tissues, and also the lower jaw. The fire was on the left side of the head. The lime was under the head, between the head and the neck.

Q. The fire had not affected the skull elsewhere ? A. Only on the left side my Lord.

Mr. Byrne : How large an area of bruising was it that you found upon the back of the head ? A. It was about  $3\frac{1}{2}$  in. in diameter.

Q. Am I right in saying that the skull had not been fractured ? A. The skull was not fractured.

Q. Did you form an opinion as to how that injury might have been sustained ? A. Yes, I formed the view that it might result from a fall backwards on to the head, or might equally well result from the head being once or twice dashed against the ground by a grip from in front.

Q. By what ? A. By a grip from in front.

Mr. Justice Wrottesley : A grip of the throat from in front ? A. It might occur through the pressure of manual strangulation.

Mr. Byrne : There is only one further question I have to ask you : What, in your opinion, was the cause of death ? A. The cause of death was, in my view, asphyxia due to strangulation by the hand.

### Cross-examined by Mr. Lawton.

Q. Dr. Simpson, will you turn to page 1 of Exhibit 4 ? Taking Plate 1 on that page, Mr. Marshall yesterday told us that when he lifted up the flagstone and saw the body underneath, the head and the body appeared to be joined together. A. Yes, appeared to be. I heard that evidence, and it was followed by the remark that when the body was lifted, the head was left behind.

Q. What is the explanation of that ? A. I think the head and the body were not joined together, but lying together.

Q. Is it possible that they might have been joined together, and the placing of a shovel or some other implement under the trunk might have caused the head to drop off? A. I cannot exclude that, but I found nothing to suggest that that was so. The head was separate when I examined the body, and I thought that to be in keeping with the evidence given by Marshall.

Mr. Justice Wrottesley: Upon that I think I should like to ask a question, Mr. Lawton. (To the witness): Was there any evidence of the head having been cut off? A. Yes, my Lord, in this respect, that the disunion between head and body was clean through the joint between the head and the upper end of the spine, whereas the first and second segments of the spine were still joined tightly together.

Q. The disunion between the head and spine was clean? A. Yes, through the joint between the skull and the spine, whereas the unions between the upper segments of the spine were firm unions by soft tissues.

Q. Was that a condition of affairs which you would not expect to find if the head had not been cut off? A. No, my Lord, bearing in mind the condition of the soft tissues at the top of the spine.

Q. You said that the soft tissues at the top of the spine were left? A. Yes, were firm.

Q. They were still firm? A. Yes, they were still firm.

Mr. Lawton: As soon as you saw the remains in the condition in which they are set out on Plate No. 1, you realized, of course, that there were parts of the body missing? A. Yes.

Q. As a result of coming to that conclusion, I am right in suggesting, am I not, that you and Inspector Keeling went to this cellar and between you you took up the whole of the floor? A. No, I examined the material which was dug from the floor and which had been set aside separately.

Q. Is it within your knowledge that practically the whole of that cellar floor had been dug up? A. Yes.

Q. I think you set about the task of sifting approximately 4 tons of earth, was it not? A. Between 2½ and 3 tons.

Q. And you and Inspector Keeling did that one afternoon? A. Two afternoons.

Q. It was as long as that, was it, and you found nothing? A. We found no human remains on this date, but we found a number of very old animal bones.

Q. No human bones. A. No human bones.

Q. Then with the material which you had you reconstructed the skeleton as shown in Plate 2? A. Yes.

Q. I want you to look, if you will, at the part of that skeleton which you described, I think, yesterday as the curved neck. A. Yes.

Q. That condition rather surprised you, I gather, did it not? A. No, it was an abnormality to which I directed some attention.

Q. First of all as to the origin of that curved neck, did you find any signs that violence had been applied there? A. There was evidence of violence to the throat tissue.

### Identification of dead body by Teeth.

Teeth decompose after a very long time. They afford good evidence of identification of persons. In the abovenoted case Mrs. Dobkins attended a dentist who had taken diagrams of her teeth and had made upper set of false teeth. Let Mr. Kopkin, the dentist recite the story in his own words:—

Q. What is your full name ? A. Burnett Abraham Kopkin.

Q. Are you a dental surgeon ? A. Yes.

Q. What are your qualifications ? A. L.D.S., R.C.S., England.

Q. Do you carry on your practice at 182 Stok Newington Road ? A. That is correct.

Q. Just look at Exhibit 2. (Same handed.) Do you recognize that ?

A. Yes.

Q. Was Mrs. Rachel Dobkin a patient of yours ? A. Yes, she was.

Q. Were you any relation to her ? A. None at all.

Q. Have you got the records of your treatment of Mrs. Dobkin ? A. I have.

Q. Have you got them with you ? A. They are in Court, I think.

Q. From those record, what was the first date on which Mrs. Dobkin came to see you ? A. She came to me on the 7th April, 1934.

Q. I do not want to go into the details of every visit. Did she attend you on various dates until the 18th March 1940 ? A. Yes.

Q. That was the last date ? A. Yes.

Mr. Justice Wrottesley : 13 months before she disappeared ?

Mr. Howard : Yes, my Lord. (To the witness) : On the 20th January of 1939, according to those records, did you re-make an upper denture for her, an upper set of false teeth ? A. That is correct.

Q. How many false teeth were there upon her upper plate ? A. Ten.

Q. Did the condition of her upper jaw remain the same ? After the 20th January, 1939, did you do anything further to the upper jaw ? A. I am sorry, I did not quite catch your point.

Mr. Justice Wrottesley : After the 20th January, 1939, did you do any more work to her upper jaw ? A. Yes, on the 18th March.

Mr. Howard : What did you do then ? A. I repaired two teeth to her denture.

Q. You replaced two false teeth on the denture ? A. Yes.

Q. After January 1939 did you do anything to her remaining real teeth ? A. Nothing at all.

Q. Have you from those records a drawing which is Exhibit 15 ? A. Yes.

Q. Showing the condition of Mrs. Dobkin's upper jaw, so far as her real teeth were concerned, as you last saw it ? A. Yes, that is correct.

Mr. Justice Wrottesley : So that would be up to date down to the 18th March, 1939, would it ? A. Up to the 18th March, yes.

Mr. Howard : 1940, my Lord. A. The 18th March 1940.

Q. In order that the jury may follow this, will you look at Exhibit 4, Page 7 ? Do you see there on the upper part of that page a pencil drawing which is marked "Upper jaw. Right side. Left side," and then the positions of certain teeth are marked, Nos. 6, 7, and 8 on the right side and No. 6 on the left side. A. Yes.

Q. Is that a replica of the drawing which you made, which is Exhibit 15 ? A. Of the drawing, but the comment underneath the drawing ..

Q. Never mind the comment for the moment. So far as the drawing is concerned, is it the same as you made ? A. The drawing corresponds.

Mr. Justice Wrottesley : "The drawing on page 7 corresponds with my record" ? A. That is correct.

Mr. Howard : If you will look at Exhibit 15, I want to deal first of all with

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the number of teeth left in the jaw. According to your drawing, on the right side there were three. A. That is correct.

Q. And they are numbered 6, 7 and 8? A. That is correct.

Q. And upon the left side, one, No. 6? A. Yes.

Q. It is plain that at some time Mrs. Dobkin had had teeth extracted. Did you do any teeth extractions for her? A. I removed two for her.

Q. Are you able to say which those two teeth were? A. Yes, they were No. 7 on the left side, the second left upper molar, which was extracted on the 23rd January, 1936, and on the 4th April, 1938, I extracted No. 8.

Mr. Justice Wrottesley: No. 8 on the same side? A. On the same side.

Mr. Howard: Is there any record of you extracting Nos. 4 and 5 on the left-hand side? A. Yes, in April 1934.

Mr. Justice Wrottesley: In April 1934 you extracted what? A. 10 upper teeth, all told, teeth Nos. 1, 2, 3, 4 and 5 on the right and on the left side.

Mr. Howard: Are you able to say whether any part of the roots of any of those teeth were left in the jaw? A. I examined the teeth after the operation, when the patient had gone. There was some absorption of some of the roots, and I made a query on my card of the possibility of No. 4 or No. 5 being left there.

Mr. Justice Wrottesley: Either, or both? A. On my card I have got "4 or 5", but it was very difficult to decide at the time.

Q. Possibly 4 or 5 were left in the jaw? A. Yes.

Mr. Howard: On which side? A. In the left upper jaw.

Q. According to your drawing Exhibit 15, you had put fillings in Nos. 6 and 7 on the right-hand side? A. Yes.

Q. And a filling in No. 6 on the left hand-side? A. That is correct.

Mr. Justice Wrottesley: R. 6 and 7 and L. 6. Is that right? A. That is correct.

Mr. Howard: What was the filling? A. Silver amalgam.

Q. Was there anything with regard to the bony structure of Mrs. Dobkin's upper jaw that you noticed? A. Yes, there was an amount of thickening of the gum tissues over the region of Nos. 6, 7 and 8 on the top right and left sides.

Mr. Justice Wrottesley: Marked thickening of the gum tissues? A. I should say extensive thickening of the gum tissues on the right and left sides, involving Nos. 6, 7 and 8.

Q. In the region of where the 6th, 7th and 8th teeth were, or would be. Is that right? A. Yes, my Lord.

Mr. Howard: In your experience as a dental surgeon, do you often come across thickening of that kind? A. Very seldom.

Q. What kind of upper palate had Mrs. Dobkin got? A. She had rather a deep roof, somewhat of the adenoid type.

Mr. Justice Wrottesley: What does that mean? A. A fairly high roof, but it was very well marked, with the gums in position; it was very well marked indeed, with the gums in position, especially with the thickening over the 6th, 7th and 8th regions on both sides.

Q. It was very noticeable to a man like yourself, who knows one mouth from another; it was very noticeable? A. Most noticeable, my Lord.

Mr. Howard: Was there anything noticeable about the ridges of her upper jaw? A. Yes, they extended as they went towards the back from the front of

the mouth; extending backwards, there was a very marked increase in the width of the jaws on both sides.

Mr. Justice Wrottesley: The width of the bones? A. Of the gum tissues which I could see in life.

Q. Of what? A. Of the gums.

Q. A marked increase in the width of the gums as you went back? A. Going from the front part of the mouth towards the posterior.

Mr. Howard: That is a description of Mrs. Dobkin's upper jaw as you last saw it? A. Exactly.

Q. Were you taken by the police on August 3rd of this year to Guy's Hospital? A. I was.

Q. And did Dr. Keith Simpson there point out to you the upper jaw of a skull? A. Yes; in fact, I might add that I picked up the skull when I first went into the laboratory itself, and recognized it immediately.

Q. You took up the skull itself when you first went in, and recognized it immediately? A. Immediately.

Q. As being what? A. As being the skull of a patient I once attended, because it corresponded in so much detail.

Mr. Justice Wrottesley: "The skull of a patient I once attended"? A. The upper jaw I recognised.

Q. Because of the upper jaw you recognized the skull as that of a patient you had once attended because it corresponded in so many details. Is that what you say? A. Yes, my Lord.

Mr. Howard: To get it quite plain, would you look again at page 7 of Exhibit 1, at the photograph at the bottom of the page? Is that a photograph of the upper jaw that you saw at Guy's Hospital? A. Yes.

Mr. Howard: That is plate 8, my Lord.

Mr. Justice Wrottesley: There are two, one on plate 1 and one on plate 8. Plate 8 is the one with the detail on it. When you say "a patient I once attended," which patient do you mean? A. Mrs. Dobkin, Rachel Dobkin.

## CHAPTER 46

### As to Identification of Persons

#### *Circumstances Affecting Accuracy of Observation*

1. A person's right perception of an object seen by him depends on several circumstances. It depends mainly—(i) On his situation relative to the object viewed, his nearness to or distance from it. (ii) Also on his capacity to see with perfect or sufficient distinctness an object far off. (iii) He may be able to discern clearly things at a great distance from him, or to see distinctly only objects near to him; that is, he may be either far-sighted or near-sighted. (iv) His right perception of the object may also depend on the light by which it is seen and therefore on the time, whether day or night. (v) It may depend, also, on the length or shortness of the time he has, in which to view the object. (vi) It may depend also on the freedom of his view from all obstructions at the time, from whatever cause, or momentary. (vii) The sun shining full in the face of a person may very much obstruct his sight. And the same effect may be produced by falling snow, or dense rain or smoke. See Ram on Facts, Chap. II, p. 7.

*Peculiarities of features.*—Stature, feature, some defect, deformity blemish on other thing natural or accidental sometimes attracts particular notice which make such an impression upon a person that will enable him long after to remember it. It is by the face that persons are chiefly known, and no two faces are perfectly



alike. We have a perfect impression and remembrance of the countenance of a friend—though not of features—although we may not be able to describe it. Ram on Facts P. 5; and wearing or loss of moustaches, wigs, accidents to face, long absence in foreign countries and frequency of observation should also be considered. Art of Cross-examination by P. R. Aiyar, Ed. 1920, pp. 538—537.

*Want of correct observation due to* (a) want of sufficient time to observe; (b) want of sufficient light, (c) want of sufficient opportunity; (d) great distance (e) observer's defective eyesight; (f) or his intoxication; (g) or terror; (h) dress, which is sometimes more noticed than the person wearing it. *Ibid*, pp. 538—539.

**Defective Observation or Slight Impression** :—The faculty of close observation of objects is largely a gift. Some persons may walk along a street and be able, without any special effort, to describe every prominent object upon and every projection into the street, while others might go up and down the same street for a year, and be unable to describe such objects and projections. Moore on Facts, Vol. II, Chapter XIV, pp. 733—790.

The weight of the evidence will be determined not so much by the number of witnesses testifying to any fact in controversy as by the means and facilities they possessed for a correct observation and knowledge of the facts. 1 Bond (U. S.) 237—246 : Per Leavitt, D. J. in 14 Fed. Case No. 7, 747 (at p. 439). The witness who had the greater interest in noticing and remembering the facts is to be believed in preference to the one that had a slighter interest to observe or was wholly indifferent. 24 Ga. 252, 255.

In daily life we are quite as likely as not to be deceived by what we have seen, and this fact is so familiar to Jurors that they are apt to distrust witnesses who profess to have seen much of complicated or rapidly conducted transactions. They want the main facts stated convincingly. The rest can take care of themselves. The extraordinary extent to which the complex development of modern life has dwarfed our powers of observation is noticeable nowhere more markedly than in the Court-room. Things run so smoothly, transportation facilities are so perfect, specialization is carried to so high a degree, and our whole existence goes on so much indoors, that it ceases to be a matter of note or even of interest that the breakfast is properly cooked and served, that we are taken down town (a little matter say of five miles) in ten or twelve minutes, that we are shot up to our offices through twenty floors in an electric elevator, that there is a blizzard or a deluge, or that part of Broadway has been blown up or a fifteen storcy building fallen down. We pass days without paying the remotest attention to the weather, and forget that we have relations. Instead of walking home to supper, pausing to talk to our friends by the way, we drop into the subway, bury ourselves in newspapers, and are vomited forth almost without our knowing it at our front doorsteps. The multiplicity of details deprives us of either the desire or the capacity to observe, and we cultivate a habit of not observing, lest our eyes and brains be overwhelmed with fatigue. Taine's "The Prisoner at the Bar" pp. 227—223. Human testimony taken at its very best is by no means infallible. A man may be perfectly honest, and his own mind quite certain that what he says is correct, but he reckons without taking into account (as indeed it is impossible for him to do), his own unconscious prejudices, his liability to mistake, and the possible failure of memory, even assuming the particular incident did indeed make the memory-producing impression on his brain. A man's religious views, his political prejudices, his pessimism, or optimism his relation to one of the actors in the drama he is asked to relate, his age, his occupation, and a variety of other matters all affect his impressions and his memory, and necessarily colour his account. 4 M. L. T. 11. (Note). A man gazing at an object through green glasses necessarily finds it coloured green; and so eyes governed by a mind clouded with strong religious,

social or political ideas record in the memory a necessarily coloured account. 4 M. L. T. 11 (Note).

**Distances of the Object Seen :—**When an object is at a great distance from a person looking at it, his perception of it may be very different from what it would be if the object were near to him. Ram on Facts, Chap. II.

Presuming the eye-sight to be normal and the light good, one is able in broad daylight to recognize :—(a) Persons whom one knows very well, at a distance of from 50 to 90 yards; when there are particular and characteristic signs, 110 yards; in exceptional cases up to 165 yards. (b) Persons one does not know very well and has not often seen from 28 to 33 yards. Criminal Investigation by Dr. Hans Gross, 1934, p. 185. By moonlight one can recognize, when the moon is at the quarter, persons at a distance of from 21 feet, in bright moonlight at from 23 to 33 feet; and at the very brightest period of the full moon, at a distance of from 33 to 36 feet. In tropical countries the distances for moonlight may be increased. These are only approximate indications; in practice they are of but slight value. Firstly the statement concerning good normal eye-sight and good light is vague and there are other supplemental circumstances to influence it. The gaseous air of the town compared with the limpid atmosphere of the mountain diminishes the range of vision by at least 10 per cent; the position of the sun, the background, the wind, and the temperature also combine to effect it to perhaps the same extent (10 per cent). Our faculty of combination, which unconsciously comes into play, may corroborate our preception so that we may be completely led into error. If a person at a distance of say 220 yards sees a man first come out and then go into the house of A and knows that A lives alone in the house, he will suppose, if the man resembles A in his exterior aspect, that the man is indeed A and will maintain the fact, as if he had seen him distinctly. In such cases verification must always be made at the spot. Criminal Investigation by Dr. Hans Gross, Ed. 1934, p. 185.

**Attention Not Drawn :—**Any cause of abstraction of attention from an object may occasion that the object makes a very small, or even perhaps no impression on the mind. Ram on Facts, p. 25.

One sound may drown another, "When I say firing, really the noise and din of breaking in the windows in the room, where I was, was so great that although firing actually occurred, I could not distinctly swear that I heard any firing at all." Frost's Trial, p. 193.

Even a momentary inattention may account for non-observation of an occurrence. Thus, a cautious army paymaster placed a package of money on a desk near a pay-in teller's window in a bank and stood facing it until, when his turn came, he proceeded to explain to the teller what sort of funds were desired, and discovered the theft of the package before he had finished his explanation. No clue to the thief or the package was ever found. But if the possibility of theft had not thus been demonstrated, the paymaster would undoubtedly have declared positively and confidently that the thing was impossible because of his constant vigilance. Reynolds's Case. 15 Ct. Cl. 314.

When President Carnot was assassinated not a single person saw the blow struck, though the assassin had jumped upon the foot-rest of the carriage, pushed aside Carnot's arm, and thrust the dagger into his abdomen. In the carriage three gentlemen were seated, two grooms were standing behind, mounted officers were accompanying on either side, and yet no one saw the President stabbed, and the assassin would have easily escaped if he had refrained from calling out in a loud voice while running away. Dr. Hans Gross, Criminal Investigation, p. 79.

Fear, horror or other mental excitement of the observer may be a cause of the distraction of attention.

"When the coffin of Marry, Queen of Scots was opened, between 1830 and 1840, it was discovered that she had at her execution received two strokes of the axe, one of which had only slashed the nape, while the second had separated the head from the trunk. But we possess a series of accounts of that execution, dating from the period itself, with all abundance and exactitude of details, and not one of these accounts mentions the first blow which merely injured the neck. Yet, judging from the careful way in which these accounts have been recorded, this detail would certainly have been reported, had it been noticed by any of the spectators; but all were evidently in such a state of agitation that not even one of them observed the false blow, and all would probably have sworn in a Court of law that only one blow was dealt. Dr. Gross states an analogous circumstance which occurred in his own experience. He was present at an execution at which for some reason or other the executioner wore gloves. After the execution he asked four of the officials who were present what was the colour of the executioner's gloves. Three replied respectively black, gray, white; while the fourth stoutly maintained that the executioner wore no gloves at all. Yet all four were in close proximity to the scaffold, each replied without hesitation, and all the four are still perfectly confident that they made no mistake. Dr. Gross, *Criminal Investigation*, pp. 78-79; *Moore on Facts*, Vol. II, pp. 749-751.

Where two persons were engaged in a spirited quarrel, and one of them afterwards testified that, he saw the other have a pistol in his pocket, but a by-stander testified that, although he looked closely for the very purpose of ascertaining whether the man had a weapon, he did not see anything of the sort, the Court credited the testimony of the affirmative witness upon the belief that considerations of his personal safety would naturally prompt him to be on the alert to observe such a sign of danger, while the other witness would not have had so strong a motive for close attention. *Moore on the Weight and Value of Evidence*, Vol. II, 1908, S. 698, 12 Ga. 213.

The attention of one witness being directed to one part or position of the subject of inquiry, and of another witness to a different point of view of the same thing, or the witnesses giving different degrees of attention to a single incident, Courts expect there will be a difference at least in the minute of their testimonies, and such divergencies constitute no reasonable basis for discrediting their united testimony to the important facts, but tend rather to enhance the credit of the witnesses. 217 Pa. St. 110, 117, 66 Atl. Rep. 239-242.

**Self-interest** :—The witness who had the greater interest in noticing and remembering the facts is to be believed in preference to the one that had a slighter interest to observe or was wholly indifferent. 24 Ga. 252-255.

Where two persons were engaged in a spirited quarrel, and one of them afterwards testified that he saw the other have a pistol in his pocket, but a by stander testified that, although he looked closely for the very purpose of ascertaining whether the man had a weapon, he did not see anything of the sort, the Court credited the testimony of the affirmative witness upon the belief that considerations of his personal safety would naturally prompt him to be on the alert to observe such a sign of danger, while the other witness would not have had so strong a motive for close attention. *Moore on the Weight and value of Evidence Vol. II. (1908), S. 698, 12 Ga. 213.* A wagon-maker testified that he recognized a buggy which passed in the night-time by a peculiar "rattle" of the wheels. "The business of the witness would tend to direct his attention to the buggy," said the Court, "and enable him to recognize the peculiar noise made by it." *State v. Rainsbarger, 74 Iowa. 196, per Beck, J.* "A physician or surgeon would be much more likely to observe particular symptoms or appearances in a medical or surgical case, and to form from them correct conclusions than an un-

skilful and inexperienced person would be likely to do." See *Starkie on Evidence*, p. 867. Pecuniary interest is generally a stronger incentive than mere curiosity. *Savannah v. Gray*, 85 Ga. 825.

Various classes of persons, by reason of their professional requirements, are better qualified to observe certain facts or conditions, as a gem merchant the shape and cuttings of a diamond, or a doctor the physical condition of a patient. See *Faines, The Prisoner at the Bar*, pp. 225-226. A man on trial for his life ordinarily would be instinctively quick to observe and complain of any manifestation of bias or prejudice against him on the part of the Jurors upon whose decision his fate depended. If he saw a suspicious interchange of signs of recognition between his prosecutor and a Juror who were supposed to be strangers to each other, its significance would doubtless impress him at once. *Trombley v. State* (Ind. 1906), 78 N. E. Rep. 976, per *Montgomery, J.* *The New York Sun* of Feb. 2, 1908.

**Peculiarity in a Person or Object :—**A witness observing a lame man getting off a train may have been prompted to notice his actions because the witness himself was lame. See 120 Mo. App. 262, 96 S. W. Rep. 714

**By Voice :—**To recognize a person by the voice alone would be a risky proceeding in a Criminal charge, though it is often enough accepted upon less important occasions. Stammering, stuttering and lisping are the most obvious peculiarities, and may under certain circumstances, as when people are heard quarrelling or in excited conversation, become of importance in identification. False teeth may alter a voice. *Taylor's Med. Jur.* 1928, p. 116.

It is very difficult to identify a person on a pitch dark night merely by the modulation of his voice and it is risky to convict a person merely on such identification. 1928 L. 925 : 29 Cr. L. J. 758 : 110 I. C. 790.

Testimony of a witness that he recognized the voice of a person with whom he conversed over a telephone is sufficient evidence of identity. *Lord Electric Co. v. Morrill* 178 Mass 304 ; N. E. Rep. 807. quoted in *Art of Cross-examination* by P. R. Aiyar, Ed. 1920, p. 524. Some persons have such peculiar voices, they can be identified by acquaintances who hear them talk, without seeing them. It is possible for persons to identify a dog by merely hearing it bark, without seeing it. *Wilbur v. Hubbard* 35 Barb (N. Y.) 304 quoted in *ibid.* The impression taken once or twice of a person's voice, gait or carriage is of little value for the purpose of identifying him. The voice may not have been in its proper, usual or natural tone due to anger, cold, etc. *Ram on Facts*, p. 62 quoted in *ibid.*

Animals and things may be identified by those familiar with them, by the noises they make. *Art of Cross-examination* by P. R. Aiyar, Ed. 1920, p. 546.

A waggon-maker can be a reliable witness to the identification of a buggy which passed in the night by a peculiar "rattle" of the wheels. *Ibid*, *Moore on Facts*, Vol. II, 1908, p. 1373. A waggon-maker testified that he recognized a buggy which passed in the night time by a peculiar "rattle" of the wheels. "The business of the witness would tend to direct his attention to the buggy," said the Court, "and enable him to recognize the peculiar noise made by it." See 74 Iowa, p. 196.

One eye-witness is worth more than ten ear-witnesses. See *Coke*, 4 Inst. 279, 2 John (N. Y.) 31 p. 35.

It is well known that shepherds readily identify their sheep however intermingled with others and offenders are not unfrequently recognized by the voice. *Syme's Justiciary Report*. 284. 31 State Trials 1124, 1129, 1137. When he putteth forth his own sheep, he goeth before them, and the sheep follow him ; they know his voice. See *John X.* 4.

**In Riot or Dacoity Cases :—**In the case of a riot or tumult, especially if sudden, it naturally happens that the minds of many, perhaps of most persons present are very much confused and observe nothing distinctly. Their minds are rapidly withdrawn from one object to another, so that they observe the scene rather in one mixed and instinct mass, than in separate defined portions. They look here and there on this side and that; in turn see different parts of what is going on; and there is very little that, separately from the mass, makes much impression on their minds. *Ram on Facts*, Chap. II.

In the crowd, however, there may be some persons who have composure enough to prevent their minds being distracted by a multiplicity of objects and can confine and fix their attention to particular matters only. And when the eye of the spectator has been attracted to some one thing, he may, for any special reason, as, for instance, an interest he takes in what some one present may say or do fasten his attention on this particular object to the exclusion of other calculated to excite his notice. But in the absence of any such cause of exclusive attention, the objects which will most attract the eye, will naturally be those which are the most prominent in the scene. And it is certain that, during a riot or tumult, it is quite impossible for any one person to see distinctly all that takes place; since while he is looking in one direction something else will surely be going on in another; and as different people may see different things, so this thing may escape the notice of one person and that of another. *Ram on Facts*, Chap. II.

People who have in the course of a riot received a number of slight wounds and one severe wound are generally incapable of telling when they received the severe one. Further, such wounded persons cannot, as a rule, state exactly how they received the blows. In short, the statements of wounded people, whenever the sense of touch is involved, must be received with great caution. *Dr. Hans Gross, Criminal Investigation*, p. 70. When complainant followed the accused on a dark night, their identification by him is doubtful. 1923 L. 161 : 5 L. L. J. 82. In case of dacoity, evidence adduced as to identification should not be accepted too readily, but should be looked at with great caution. 1932 O. 317 : 139 I. C. 751 : 32 Cr. L. J. 920, 4 O. L. J. 88. Identification made at night during dacoity when blows are struck and people are terrorised is generally of little value. 1927 C. 820 : 28 Cr. L. J. 874. In dacoity cases no Court will convict the accused unless identified in jail soon after his arrest. 1924 A. 645 : 85 I. C. 245 : 26 Cr. L. J. 501.

**Special Attention Drawn by Unusual Sight or Sound :—**Witnesses who give reasons for the accuracy of their observations are preferred to those who merely state the fact to be so, without adverting to any circumstances showing that their attention was particularly called to it. *Moore on Facts*, Vol. II, 1908, S. 691, p. 745. One man may pass another, and in passing see him, and yet the sight of him may make little impression on his mind. He may have but a very slight impression of his features, height or dress. But if he looked at him purposely to inform himself of his features, stature or dress, then probably the impression will be deep. *Ram on Facts*, p. 21. Where the observer much more quickly and makes a stronger impression than a thing or event of common occurrence. Thus a man met on an unfrequented path attracts attention, while if encountered on a high road he might pass unregarded. An unusual gait, manner or dress of a person excites notice. An unusual sight or sound may be deeply impressed on the mind; as the sight of a wounded man or a shriek of alarm. If a pistol, knife or other formidable weapon is seen in the hand of a man, in a place or at a time which does not fit with his armed appearance, attention is drawn to him. *Ram on Facts*, p. 22.

When we see a friend, who, from any cause, has become altered in his appearance since we saw him last, this change is likely to make a deep impression on the mind. Ram on Facts, p. 23.

The attention of one witness being directed to one part or position of the subject of inquiry, and of another witness to a different point of view of the same thing, or the witnesses giving different degrees of attention to a single incident, Courts expect there will be a difference at least in the minute of their testimonies, and such divergencies constitute no reasonable basis for discrediting their united testimony to the important facts, but tend rather to enhance the credit of the witnesses. 217 Pa. St. 110, 117, 66 Atl. Rep. 239-242.

The shining of the eye of a person lying in concealment is apt suddenly to betray him. The same is the case in respect of a cat's eyes seen in darkness. Rockby, Canto *iii*.

It is often stated that things in motion sooner catch the eye than what not stirs. Troilus and Cross. A. *iii*, S. 3.

If there is some distinguished man, one eminent by his rank, by his military services, or by his scientific knowledge among the assemblage, it produces a strong impression on the mind. So it may make an impression that a person was there, about whom there was something remarkable, as language or dress seldom heard or seen, or a person having moral view of a subject.

**By Family Likeness:**—Family likeness has often been insisted upon as a reason for inferring parentage and identity. In the Douglas Case, Lord Mansfield said: 'I have always considered likeness an argument of child's being the son of a parent, and the rather as a distinction between individuals in the human species is more discernable than in other animals; a man may survey ten thousand people before he sees two faces perfectly alike and in any army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discrimina<sup>c</sup>y of voice, a difference in the gesture, the smile and various other things, whereas a family likeness runs generally through all these for in everything there is a resemblance, as of features, size, attitude and action. 2 Collectanea Juridica 402, Beck's Medical Juris. 7th Ed., p. 402. Where the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the servants of the alleged father, with whom adultery was proved, was held not to be relevant, as being too much a matter of fancy and loose opinion to form a material article of evidence. Traite's Law of Ev., 2nd Ed., pp. 441, 3.

**By Photograph:**—In comparing photographs for the purpose of identification following cases may occur:—(a) *Comparison of one portrait with another.*—If the portraits are of different sizes, they must be enlarged to make them of the same size. Then measurements must be taken with compass, (b) *Comparison of a portrait with an accused.*—The precaution of clothing and dressing the hair of the accused as he is in the photograph must be taken. (c) *Comparison of portrait with a person at liberty.*—All the features of the photograph must be carried in the memory. (d) *Comparison of a portrait with our recollection.*—Supposing the witness has seen the accused only once, when he cheated, robbed and wounded him, the witness's opinion will be of little value. His recognition will inspire more confidence if when he is able to pick out the person from a number of similar photographs, and does not recognize him simply because he had a moustache and there is in the collection only one photograph of a person with a moustache. Criminal Investigation by Dr. Hans Gross, Ed. 1934, p. 184. Enormous difficulty is always experienced in recognizing persons from photographs, especially when the person recognizing is a simple-minded fellow who has rarely seen photographs

and has never before tried to find resemblances. *Ibid* Photographic likeness now frequently leads to the identification of offenders. *Wills' Circumstantial Ev.*, 6th Ed., p. 190.

**By Gait** :—The impression taken once or twice only of a person's voice, gait, or carriage, may sometimes be of but little value for the purpose of identifying him. The voice may not have been in its proper and usual tone, but in one accidental, arising from some passion, as fear or anger or from bodily ailment, as a cold ; or in a tone in imitation of another's voice, or otherwise distinguishing its own usual and proper tone. So the gait or carriage may not have been the person's usual gait or carriage, but one caused by temporary lameness or other bodily indisposition or assumed for the very purpose of disguise. *Ram on Facts*, p. 63.

Rush, the murderer of Mr. Jermy and his son, had a particular way of carrying his shoulders, and he used to keep his head a little on one side. From these peculiarities, and his height, size and gait, he with his face covered and otherwise in disguise, was, at the time of the murder in the Stanfield Hall, recognized by four persons in the midst of repeated discharges of fire-arms and the shrieks, wounds and death there occasioned. *The Times*, March 30th and April 5th, 1849.

**Mistakes in Identification** :—Most people cannot easily remember faces. *Moore on Facts*, Vol. II, 1908, p. 1367. A large proportion of mankind, as every great painter will testify, never see faces accurately at all. *Colegrove on Memory*, pp. 346-347 citing *Spectator*, Vol. 58. It is simply a matter of cultivating the habit of careful perception. It is poor seeing, not poor memory. *Moore on Facts*, Vol. II, 1908, p. 1367. So many mistaken identifications are made that "the Jury must receive and consider evidence of personal identity which is inconsistent with other evidence in the case, with scrupulous care and caution." 23 Fed. Case No. 14059 (at p. 1304) per Love D. J.

Two men were convicted of a murder and executed and the identity of the prisoners was positively sworn to by a lady who was in company with the deceased at time of the robbery and murder, but several years afterwards two men, who suffered for other crimes, confessed at the scaffold the commission of the murder for which these persons were executed. *See Wills' Circumstantial Ev.*

These contradictions make one tremble at the consequences of relying on evidence of this nature, unsupported by other proof. *Reading Assizes*.

In the famous Tichborne case 212 witnesses were examined for the Crown and 256 for the defence, who were, in the issue, divided into four groups on the question of identity, any one of which gave evidence that contradicted in terms the evidence of one of the three remaining groups. 13 Cr. L. J. 86. (Eng.)

**By Insufficient Light** :—In cases of identity it may be necessary to enquire about the light by which the person was seen. As incidental to the establishment of identity, the quantity of light necessary to enable a witness to form satisfactory opinion has occasionally become the subject of discussion. *Wills' Circumstantial Ev.*, 6th Ed., p. 182.

A witness stated that a man came into his room in the night and caused a light by striking on the stone floor with something like a sword, which produced a flash of light near his face, and enabled him to observe that his forehead and cheeks were blacked over in streaks, that he had on a dark-coloured coat and a dark-coloured handkerchief and was a large man, from which circumstances and from his voice he believed the prisoner to be the same man. The prisoner was acquitted, but, undoubtedly, such evidence has occasionally been acted upon. 81 State Trials 1124, 1285—37, 1137.



An assault took place near a lamp and was witnessed by the victim's wife, his niece, and two servants, who all swore with more or less confidence to the identity of the murderer with the man who was being tried, and they had been very near him. He, however, successfully established an alibi and was acquitted. *Wills' Circumstantial Evidence.*

**After a Number of Years :—**Every face has its customary countenance, that which it usually wears, and this may last without any observable change for some time ; it may so continue for a period in infancy, boyhood, manhood or old age. Yet by imperceptible degrees, the face and countenance are constantly, throughout their existence undergoing an alteration ; and at each successive arrival at boyhood, manhood and old age, it is found that a change, and a great one, has, in the intervening time, been made in the face and countenance. So that when we have known an elderly person from his childhood, we have known him different faces and countenances. *Ram on Facts*, p. 58. A sure innovator on a countenance is time. Time alters the form of features, imparts wrinkles, changes the complexion, whitens and destroys hair. *Ibid* p. 60. If two persons, each between sixty and seventy years of age were forty years ago almost daily together and intimate friends, but during those forty years have never met, and at the end of that time they happen to meet, a great probability is, they will not at all recognise each other ; and if each is convinced of the other's identity, it will not be by their sight, but their conversation, bringing to each other's mind events or circumstances which took place antecedent to the forty years and of which each has a remembrance. *See Ram on Facts*, p. 61.

**By Whiskers or Wig :—**A temporary change may also be artificially caused. The wearing or loss of moustaches or whiskers may have this effect. So may the temporary wearing on the head of false hair or a wig. This we learn from the Vicar of Wakefield, and his respectable acquaintance Mr Jenkinson :—“ I could not,” says the Vicar, “ avoid being surprised at the present youthful change in his aspect ; for at the time I had seen him before, he appeared at least sixty.” “ Sir,” answered he, “ you are little acquainted with the world ; I had at that time false hair, and have learned the art of counterfeiting every age, from seventeen to seventy.” *Vicar of Wakefield*, Ch. XXV.

**By Person in Fear :—**Fear has a very different effect upon different persons ; in some it prevents clear perception, whilst in others it assists in making an indelible impression. *Starkie on Evidence* 828, note X. A striking instance is that of the identification of robbers by persons whom they had tortured in the night time. A robber was completely and unequivocally identified by a witness whom he had put in fear of his life by presenting a revolver at close range while he took his money. *Moore on Facts*, Vol. II (1908), p. 1870.

Fear, horror or other mental excitement of the observer may be a cause of distraction of attention. “ When the coffin of Mary, Queen of Scots was opened, between 1830 and 1840, it was discovered that she had at her execution received two strokes of the axe, one of which had only slashed the nape, while the second had separated the head from the trunk. But we possess a series of accounts of that execution, dating from the period itself, with all abundance and exactitude of details, and not one of these accounts mentions the first blow which merely injured the nape of the neck. Yet, judging from the careful way in which these accounts have been recorded, this detail would certainly have been reported had it been noticed by any of the spectators ; but all were evidently in such a state of agitation that not even one of them observed the false blow, and all would probably have sworn in a Court of Law that only one blow was dealt. Dr. Gross states an analogous circumstance which occurred in his own experience. He was present at an execution at which for some reason or other the executioner wore gloves. After the execution he asked four of the officials who were present



what was the colour of the executioner's gloves. Three replied, respectively, black, gray, white; while the fourth stoutly maintained that the executioner wore no gloves at all. Yet all four were in close proximity to scaffold, each replied without hesitation, and all the four are still perfectly confident that they made no mistake." *Moore on Facts*, p. 749.

Sometimes fear and such other mental excitement may intensify the attention of the individual. "Where two persons were engaged in a spirited quarrel, and one of them afterwards testified that he saw the other have a pistol in his pocket, but a by-stander testified that, although he looked closely for the very purpose of ascertaining whether the man had a weapon, he did not see anything of the sort, the Court credited the testimony of the affirmative witness upon the belief that considerations of his personal safety would naturally prompt him to be on the alert to observe such a sign of danger, while the other witness would not have had so strong a motive for close attention. *Moore on Facts*, p. 698.

**By Dress :—**Dress is sometimes more noticed than the person who is wearing it, especially if the observer's daily occupation is connected with dress. When one at the same time takes an impression of a person, and of the dress he is then wearing, a recollection of the dress may be an auxiliary power to identify the person; yet it is obvious that this identification ought mainly to rest on the remembrance of the person independently of the dress; for the dress, of which the impression was taken, may have many likenesses; as, for instance, soldier's uniform, labourer's frocks; and the dress supposed to be one remembered, and used to identify it, may be one of those likenesses; and in proportion to their number will be the danger of mistaken identity of person. And, besides, admitting the dress to be rightly identified, it does not follow that the person who wore it, when the impression of it was taken, is the man who owns and now wears it and whose identity is in question for it might have been lent by him, or stolen from him, and by one of these or some other means, have clothed another person when the impression of the dress was taken. *See Ram on Facts*, pp. 69-70.

It is not safe to rely upon the articles of clothing when the body cannot be identified on account of advanced decomposition., 15 P. W. R. 1915 Cr. : 1923 L. 40 : 25 Cr. L. J. 783.

**By Parents :—**In the case of assumed recognition of a child by its mother there is no doubt that motherly instinct is entitled to consideration, but its value must be measured by her opportunities for observation. The question of identity must, after all, be established by facts, and not by mere instinct. *Country Ct. Misc. (N. Y.) 289, 99 (N. Y.), Supp. 227.*

In the celebrated Tichborne case Lady Tichborne confidently identified the claimant as her son. It was in that case that Lord Chief Justice Cockburn said, "The knowledge of identity on the part of a parent is the result not of any natural impulse, independent of observation and judgment, whereby a mother is better able to recognise her child than anybody else would be. It arises from the continually serving and watching the particular individual from becoming familiarized by daily habit with everything that appertains to personal identity—features, form, gestures,—everything which constitutes the sum total of identity. *Moore on Facts*, Vol. II, 1908, p. 1372.

**By Aged Persons :—**An old man who combines a venerable appearance with a failing memory is the witness most to be feared by either side. *Moore on Facts*, Vol. II, 1908, p. 1372. In a recent case a patriarch of some eighty-five years positively, convincingly, and ultra-dramatically identified the defendant as a man who had knocked him down and robbed him of a ring. The identification was so perfect that on the evidence of this aged witness alone the Jury convicted

the defendant, after but a few moments' deliberation. He was sentenced to ten years in state's prison although he denied vehemently that he had ever seen the complainant. As he was being led from the bar, the real criminal arose among the audience and gave himself up, stating that he could not sit by and see an innocent man receive so great a punishment. *The Prisoner at the Bar*, pp. 230-231. Memory of aged persons in respect of recent events is notoriously fallible. *Moore on Facts*, Vol. II 1908, p. 1372.

**Identification Parade by Magistrate:**—The accused was in the custody of Jail officials and not Police officers, and was mixed with persons of same class or position, dressed in the same manner who were allowed to change their places and clothes from time to time and alter their appearances by shaving or cutting hair. No two witnesses were allowed to communicate with each other after identifying. The Magistrate embodied the result in the notes prepared by him and proved it in the Court. Held, the identification proceedings were absolutely honest and careful. 1927 O. 369 : 106 I. C. 721 : 29 Cr. L. J. 129. Identification parades do require most careful scrutiny. 1924 M. 232 : 25 Cr. L. J. 145. Identification must be made immediately after the arrest. In dacoity cases, no Court would convict the accused who was not identified in the Jail soon after his arrest. 1924 A. 645 : 26 Cr. L. J. 501. Court should vary the order in which the accused should stand at the time of identification, if asked to do so by the accused. 9 Mys. L. J. 385. Presence of Police Constable in the room where identification is held is objectionable. 1934 L. 692.

The Magistrate should make a list of outsiders mixed with the accused for the purpose of identification with their names and addresses. (b) The Magistrate should note in what connection the witness identifies him. (c) If a wrong person is identified it should be noted. (d) It is the duty of the Magistrate to record any complaint or objection made by accused at the time of identification parade, and if the complaint is absolutely futile, he may note it as such. 1935 L. 230 : 35 Cr. L. J. 1180.

Identification parade must be held at the earliest opportunity and all available witnesses should be required to attend at the very first parade. 1934 L. 641 *See* 1932 L. 488. Little or no value be attached to identification parade held 16 months after the event particularly when the accused is a man of the same village as that of identifying person. (1946) 47 Cr. L. J. 780.

The question whether a witness has or has not identified a man during investigation is not one which is in itself relevant at the trial. The actual evidence is that given by witnesses in Court. Its value is not strengthened by the recognition of witness at the parade, although on the other hand, its value will be destroyed if it is shown that they have failed to identify accused prior to trial. 1936 Pesh. 166.

The proportion of five other persons to one accused person for identification is the minimum desirable proportion for the purpose of satisfying the Court that identification was not a question of accident. If this standard is not fully satisfied, the identification should not be rejected but should be subjected to rigid scrutiny. 1935 A. 652 : 157 I. C. 146 : 1936 Cr. C. 652. Cr. Appeal No. 248 of 1927 decided by Allahabad High Court on 15th May 1928 Rel. on. Each suspect must be mixed with at least ten under-trials. 1936 A. 873. Putting on some mark on suspect is objectionable 43 Cr. L. J. 742. For other cases *see* *Prem's criminal practice* 1947.

**Identification Parade held by Police.**—Statements made by witnesses to Police during the investigation are not admissible to corroborate the evidence given at the trial. 6 L. 171 : 1925 L. 399 : 27 Cr. L. J. 438, 1926 P. 232, 1935 C 311.

Where identification proceedings held by the Police are not supervised by the Magistrate, the proceedings under S. 162, Cr. P. C., will be inadmissible under S. 157, Ev. Act, to corroborate their testimony given in Court. 1935 C. 311=62 C. 918, 1943 C. 644, 1940 C. 183, 54 B. 528.

Evidence of Police Officer regarding the identification of accused by the prosecution witnesses in the parade is admissible, being a simple exposition of fact or circumstance witnessed by him, and S. 162 is no bar as it does not relate to any statement made to the Police. 1929 N. 36 (38) : 29 Cr. L. J. 963 : 112 I. C. 51. Identification parade held by Police requires most careful scrutiny; for if a person has seen the accused before the parade, he will identify him. 1924 M. 232 : 25 Cr. L. J. 145, 1924 O. 295 : 25 Cr. L. J. 1125.

**Value of Identification Parade.**—Identification in Jail but not in Court has little value. 1930 A. 746 : 32 Cr. L. J. 152. Identification of accused not previously known on a dark night has no value. 1930 O. 60. Where the number of accused differs in F. I. R. and the complaint, the identification is untrustworthy, when F. I. R. was given after long delay. 62 I. C. 209, 27 Cr. L. J. 225. Identifications made at night during a dacoity where blows are struck and people are terrorized are generally of very little value. 1927 C. 820 : 28 Cr. L. J. 874, 1932 L. 299, 27 Cr. L. J. 492. See 1932 L. 488. When the identification marks are told by the Police to the witness before identification, it is of no value. 1928 L. 724 : 29 Cr. L. J. 697. The fact that a witness makes mistake in identification is no reason for discrediting his evidence in other matters. 45 A. 300 : 1923 A. 352. Sometimes the identification of the particular accused by witnesses to whom they were strangers is useful. 19 P. W. R. 1916 Cr. : 17 Cr. L. J. 156. When the complainant made no mention of the offender in F. I. R. the subsequent statement that he identified him at the time of attack is unreliable. 91 P. L. R. 1915. The power of observation and memory of different persons varies and the fact that the witness fails to identify a culprit does not render the identification by other witnesses valueless. 1931 L. 178 : 32 Cr. L. J. 684. The test for finding if the identification of accused by the deceased could be relied on would be, whether deceased mentioned the assailants' name soon after the occurrence, when he had no opportunity of consultation with others. 1931 M. W. N. 731. Where in the First Information Report only two dacoits are alleged to have been recognized at the time of commission of dacoity, subsequent evidence that they were all identified cannot be relied upon. 16 Cr. L. J. 204. When witness was shown the accused beforehand and he identified the accused at parade but not in Court, held, that his evidence was of no value, when he did not state that he had forgotten the face owing to lapse of time. 1935 L. 230 : 35 Cr. L. J. 1180. If the identification of accused by witness is not satisfactory, it is not sufficient corroboration of approver's story. 1935 A. 162. When the trial of accused turns upon question of wrong identity, test identification must be held. 1934 C. 169 : 35 Cr. L. J. 601. The Magistrate conducting the parade must take intelligent interest, as life and liberty of accused person may depend on his vigilance and caution. 1933 L. 946. Where the identification is based upon a momentary glimpse in the confusion and excitement of the moment at night, though it was moonlit night, chances of error become greatly increased. 1932 O. 99 : 33 Cr. L. J. 331. In determining what weight should be given to the identification test, (i) the number of 'wrong persons' picked out, (ii) consistency of identifications made at different times, (iii) large number of men paraded along with the suspects, (iv) picking out of many persons at random should be considered. 1932 O. 287 : 34 Cr. L. J. 197. If the witness identified three suspects as against four "wrong men" the identification test should not carry much value. 1933 O. 49 : 34 Cr. L. J. 382. It must be determined whether all the persons identified were previously known to the witnesses or were perfect strangers to them, the time of

## AS TO IDENTIFICATION OF PERSONS

occurrence, the state of light and the opportunities which the witnesses had of identifying them. 1929 A. 928 : 31 Cr. L. J. 206. Use of policemen in identification parade is not objectionable if proper precautions are adopted. 1936 L. 409 : 162 I. C. 969.

The power to identify varies according to the power of observation, which the witness may not be able to describe. Exact amount cannot be laid down. 1930 O. 455 : 32 Cr. L. J. 162 : 1931 L. 178 : 32 Cr. L. J. 684. Witnesses may identify persons they may not have seen for years. 1928 C. 430 : 29 Cr. L. J. 1009 : 112 I. C. 337.

Identification tests, as a rule, cannot form a sufficient basis for conviction, though they may perhaps add some weight to the other evidence against the accused. 1929 S. 149 : 30 Cr. L. J. 456, 1924 O. 295 : 25 Cr. L. J. 1125. Evidence of a witness given in Court should be accepted only if he identifies the accused whom he previously identified in Jail. 1925 L. 137 : 25 Cr. L. J. 1272. As a general rule, failure of the witness to identify the accused in Court, whom he identified in Jail, weakens his evidence. 1930 O. 455 : 32 Cr. L. J. 162, 28 Cr. L. J. 850, 1927 O. 369 : 29 Cr. L. J. 129, 1928 L. 549 : 29 Cr. L. J. 366.

Where persons between 18 and 26 were paraded with the accused of 16 years and they were made to sit outside the Thana before the persons were called in for identification the parade was unfair. 1933 L. 308 : 34 Cr. L. J. 714

Value of identification depends on two factors:—the identifying persons must not have seen the accused after the crime and there should be no mistakes or negligible ones. 1936 A. 373. Court should not accept blindly identification evidence to outweigh the evidence of respectable eye witnesses. 1927 C. 820, 1932 O. 287, 1933 L. 299, 1928 L. 724, 1923 L. 662, 1931 L. 641, 1927 O. 196, 1932 S. 55, 1929 S. 149, 1925 L. 137, 1929 A. 123, 1930 A. 746, 5 L. 396, 27 Cr. L. J. 946.

Accused was mixed up with five others. He was identified by three persons out of 9 identifying witnesses, Held, it was sufficient identification. 1935 A. 477 : 154 I. C. 812. Wrong identification of persons by witnesses was considered immaterial, when the identification was conducted in jail and four groups of men mixed with suspects were made. 1935 C. 513 (522) : 36 Cr. L. J. 1115. If a person identified three suspects as four "wrong men" identification is not entitled to weight. 1933 O. 49. For other cases *See* Prem's Criminal Practice.

### Illustrations.

(i) Grayson was charged with shooting Lockwood at a camp meeting, on the evening of August, 9, and with running away from the scene of the occurrence, which was witnessed by Sovine. The proof was so strong that, even with an excellent previous character Grayson came very near being lynched on two occasions soon after his indictment for murder. The mother of the accused, after failing to secure senior counsel, finally engaged young Abraham Lincoln, as he was then called, and the trial came on at an early hearing. No objection was made to the jury, and no cross-examination of witnesses save the last and the only important one, who swore that he knew the parties, saw the shot fired by Grayson, saw him run away, and picked up the deceased, who died instantly. The evidence of guilt and identity was morally certain. The attendance was large, the interest intense. Grayson's mother began to wonder why Abraham remained silent so long and why he did not do something. The people finally rested. The tall lawyer (Lincoln) stood up and eyed the strong witness in silence, without books or notes, and slowly began his defence by these questions:—

## CROSS-EXAMINATION

Q. And you were with Lockwood just before and saw the shooting? A. Yes.

Q. And you stood very near to them? A. No, about twenty feet away.

Q. May it not have been under twenty feet? A. No, it was twenty feet or more.

Q. In the open field? A. No, in the timber.

Q. What kind of timber? A. Beech timber.

Q. Leaves on it are rather thick in August? A. Rather.

Q. And you think this pistol was the one used? A. It looks like it.

Q. You could see defendant shoot—see how the barrel hung, and all about it? A. Yes.

Q. How near was this to the meeting place? A. Three-quarters of a mile away.

Q. Where were the lights? A. Up by the ministers' stand.

Q. Three-quarters of a mile away? A. Yes, I answard ye twice.

Q. Did you not see a candle there with Lockwood or Grayson? A. No, what would we want a candle for.

Q. How, then did you see the shooting? A. By moonlight.

Q. You saw this shooting at ten at night, in beech timber, three-quarters of a mile from the lights, saw the pistol barrel, saw the man fire, saw it twenty feet away, saw it all by moonlight, saw it nearly a mile from the camp lights? A. Yes, I told you so before.

The interest was now so intense that men leaned forward to catch the smallest syllable. Then the lawyer drew out a blue-covered almanac from his side coat pocket, opened it slowly, offered it in evidence, showed it to the jury and the Court, read from a page with careful deliberation that the moon on that night was unseen and only rose at one the next morning. Following this climax Mr. Lincoln moved the arrest of the perjured witness as the real murderer saying: Nothing but a motive to clear himself could have induced him to swear away so falsely the life of one who never did him harm! With such determined emphasis did Lincoln present his showing that the Court ordered Sovine to be arrested and under the strain of excitement he broke down, and confessed to being the one who fired the fatal shot himself, but denied it was intentional. *See Tact in Court.*

(ii) The author was engaged in a case of dacoity with murder under S. 396, Indian Penal Code. The prosecution case was that the accused, who were seven in number, committed dacoity on a dark night armed with pistols, guns and other deadly weapons. They killed two of the inmates of the family and carried away jewellery and cash of considerable value. One of the accused became an approver and the remaining six were put on trial, after 18 months from the date of occurrence. The sole question was identification of the accused in this case. Three gang men of the Railway were produced and they deposed that they were working on the lines and at noon at about 1 p. m. when they were taking the noon nap after hard labour under the shade of a tree, they found that six accused were going on three horses armed with deadly weapons. They identified the accused in jail in the identification parade as well as in Court. Cross-examination of one of them proceeded as follows:—

Q. "When did you start the work in the morning?" A. "At 6 o' clock."

Q. "When did you stop the work at noon?" A. "At 12 o' clock."

Q. "When were you to begin the work after the recess?"

A. "At 3 o' clock, because it was too hot in the day."

- Q. "You generally take rest from 12 o'clock to 3 p. m.?" A. "Yes."
- Q. "You take your meals in that interval?" A. "Yes."
- Q. "And then you go to sleep?" A. "Yes."
- Q. "At the time the accused passed by you were all asleep." A. "Yes."
- Q. "And the noise of the horse's hoofs awakened you?" A. "Yes."
- Q. "How far were you sleeping from the footpath where the accused were going?" A. "At about 40 or 50 yards."
- Q. "You did not rise and sit up to see the accused?" A. "No, I partially rose when accused passed by us."
- Q. "Were the accused going at slow pace or at fast speed?"  
A. "They were going at very rapid pace."
- Q. "You saw that the accused Nos. 1 and 5 were on the first horse?" A. "Yes."
- Q. "And accused Nos. 2 and 6 were on second horse?" A. "Yes."
- Q. "And accused Nos. 3 and 4 on the third horse?" A. "Yes."
- Q. "The first horse was of chesnut colour, the second was a mare and the third was a gray horse?" A. "Yes."
- Q. "And you are sure that first and third were horses and the second was a mare?" A. "Yes."
- Q. "The accused No. 1 was carrying a *dang* mounted with *chhavi* and the accused No. 5 had a revolver in his hand?" A. "Yes."
- Q. "And the accused No. 2 was carrying a gun and No. 6 was carrying a revolver?" A. "Yes."
- Q. "The accused No. 3 was carrying a gun and the accused No. 4 had a sword?" A. "Yes."
- Q. "And you are sure that the accused No. 6 was riding behind No. 2, No. 5 was riding behind No. 1 and the accused No. 4 was riding behind No. 3?" A. "Yes."

This was impossible because horses were going at a very rapid speed, as the other witnesses deposed and his account was so exaggerated and he was ready to go to such an absurd length when he said that he could identify all the accused, their respective places, weapons in their hands and the colour of horses and also whether one of the horses was a mare. The Court rejected the testimony of these witnesses.

(iii) In the above case another set of 8 witnesses of the village where dacoity was committed and of neighbouring villages was produced who attended the identification parade in jail at Montgomery and identified the accused. Two of these witnesses attended the identification parade on the 4th of August while the remaining six attended the second identification parade on the 8th of August. The accused were Jat Sikhs of District Amritsar. The districts of Amritsar and Lahore are called Majhas while districts of Ferozepore, Ludhiana and Jullundur are called Malwa and the districts of Montgomery, Jhang, Lyallpur and Multan are called Jangals. The Sikhs of these districts are respectively called Majha Jats, Malwa Jats and Janglu Jats. These three types of Sikhs have almost different features and different manners of dressing, etc. The cross-examination of one of these witnesses proceeded as follows:—

Q. "You along with five other witnesses were called at Pakpattan Police Station by the Police Sub-Inspector to accompany him to Montgomery for identification of the accused?" A. "Yes."

Q. "You travelled in the same lorry along with the Sub-Inspector?" A. "Yes."

Q. "And the first two witnesses (the witness who had identified the accused on 4th August) were also with you in the lorry?" A. "Yes."

Q. "You were all talking about this dacoity while in the lorry?" A. "Yes."

Q. "You were told that the accused were all Sikhs and belonged to Majha tract, and that one of them was about 70 years old and his son of about 19 years was one of the dacoits?" A. "Yes."

Q. "The said two witnesses and the Sub-Inspector were the chief persons who did the most talking?" A. "Yes."

Q. "You were brought to the District Courts of Montgomery?" A. "Yes"

"You were made to sit outside the Court for about three or four hours, *i. e.*, up to 5 o'clock when the identification parade was held in the Jail?" A. "Yes,"

Q. "While sitting there you saw some Sikhs who were in hand-cuffs and fetters taken by the Police?" A. "Yes, they passed by us while we were sitting there."

(The record showed that the accused were produced that day before the Magistrate at Montgomery for further remand. The witnesses were purposely made to sit there so that they might have opportunity to see the accused before identification.)

Q. "How many people were mixed with the accused at the time of the identification parade?" A. "There were six accused and about 9 or 10 outsiders."

Q. "Do you know the Jat Sikhs are of three types or classes?" A. "No."

Q. "I will tell you that they are Majha, Malwa and Janglu Jat Sikhs." (Majha Jats belong to Lahore and Amritsar District, Malwa to Ferozepur and Ludhiana District and Janglu Jat to Montgomery District)? A. "Yes."

Q. "Can you distinguish these types of Sikhs if shown to you separately?"

A. "I can always make out a Majha Jat from that of Malwa and Janglu Jats by his peculiar features, beard, dress and particularly the manner of his tying the turban."

Q. "Now tell me whether the outsiders mixed with the accused in the identification parade were Malwa or Janglus?" A. "They were Janglus belonging to Montgomery and Multan districts."

Q. "And the accused were all Majha Jats?" A. "Yes."

This showed that identification was very easy as the identifying person had knowledge beforehand that the accused were Majha Jats and they were mixed up with Janglu Jats, and moreover the accused had been shown to them near the District Courts, and the identification was held about 18 months after the date of the occurrence.

The judge rejected the testimony on the point of identification.

(iv) Two sisters living in the same house in Chicago had babies of equal age, who so resembled each other their own mothers were unable to distinguish them when they were together. Now it so happened that by the carelessness of the nurse, the babies got mixed together. Their physician came to the lawyer in great distress.

Q. "But perhaps the children were not changed at all." A. "Oh, but there is no doubt that they were changed."

Q. "Are you sure of it?" A. "Perfectly."

"Well, if that is the case, why don't you change them back again. I don't see any difficulty in the case." See 29 M. L. J. 93.

(v) A young man was tried at the old Bailey, July, 1824, on five indictments for different acts of theft. It appeared that a person resembling the prisoner in



size and general appearance had called at various shops in the metropolis for the purpose of looking at books, jewellery and other articles with the pretended intention of making purchases, but made off with the property placed before him while the shop-keepers were engaged in taking out other articles. In each of these cases the prisoner was positively identified by several persons, while in the majority of them alibi was as clearly and positively established, and the young man was proved to be of orderly habits and irreproachable character, and under no temptation from want of money to resort to acts of dishonesty. Similar depredations on other tradesmen had been committed by a person resembling the prisoner, and the tradesmen deposed that, though there was a considerable resemblance to the prisoner, he was not the person who had robbed them. He was convicted upon one indictment, but acquitted on all the others and the Judge and Jurors who tried the last three cases expressed their conviction that the witnesses had been mistaken, and that the prosecutor had been robbed by another person resembling the prisoner. A pardon was immediately procured in respect of that charge on which the conviction had taken place. *See Rex v. Robinson, O. B. Sessions Papers, 1824, 423.*

(vi) A respectable young man was tried for a highway robbery committed at Bethnal Green, in which neighbourhood both he and the prosecutor resided. The prosecutor swore positively that the prisoner was the man who robbed him of his watch. A young woman, to whom the prisoner paid his addresses, gave evidence which proved a complete alibi. The prosecutor then was ordered out of the Court, and in the interval another young man, who awaited his trial on a capital charge, was introduced and placed by the side of the prisoner. The prosecutor was again put into the witness-box, and addressed by the prisoner's counsel thus: "Remember, the life of this young man depends upon your reply to the question I am about to put. Will you swear again that the young man at the bar is the person who assaulted and robbed you?" The witness turned his head towards the dock, when beholding two men so nearly alike, he dropped his hat, became speechless with astonishment for a time, and at length declined swearing to either. The prisoner was of course acquitted. The other young man was tried for another offence and executed, and, before his death, acknowledged that he had committed the robbery in question. *See Paris and Fonblanque Medical Jurisprudence, Ed. 1823, Vol. II.*

(vii) Two men were convicted before Mr. Justice Grose of a murder and executed, and the identity of the prisoners was positively sworn to by a lady who was in company with the deceased at the time of the robbery and murder, but several years afterwards two men, who suffered for other crimes, confessed at the scaffold the commission of the murder for which these persons were executed. *See Wills, Circumstantial Evidence.*

(viii) At the first trial of Mr. Beck, for obtaining money by false pretences in 1896, it was said that the evidence of identity was most overwhelming, ten witnesses to identity picking him out from a numbers of others without the slightest hesitation. But two crimes (*i.e.*, those of 1877 and 1896) were committed by one and the same man. Mr. Beck did not commit the first (because he was in Peru in 1877). Therefore, he did not commit the second. Again in 1904, five other witnesses repeated the same fatal mistake of confounding Mr. Adolf Beck with John Smith. The latter was convicted in 1877 for extraordinary frauds of an identical character with those of 1896 and 1904.

(ix) A previous acquaintance is more or less a condition precedent to satisfactory identification, but Romilly relates that a sailor was wrongfully convicted for mutiny on 'the *Hermoine*' on the evidence of the master, who must have had frequent opportunity of seeing the man he was mistaken for. In the above case, Rolfe B., observed that there is no sort of evidence that is given that is more



convincing (than evidence of identity) and yet which has more frequently proved to be completely unfounded. At the trial of Elizabeth Canning, in 1754, 36 witnesses positively swore that a particular person, whom they knew well, was in Dorsetshire at a certain time and 26 other witnesses swore that the same person whom they knew equally well was at the same time 150 miles off in Middlesex.

(x) In the case of William Thompson (1912) twenty-one witnesses swore that a person charged with obtaining a number of horses by false pretences, was the offender, but this was shown to be impossible by hand-writing and other circumstantial evidence. Upon the principle of similar acts : Bull's case (1911) 6 Cr. App. 41 Parl. Pap., Beck Commission, 1905, Cd. 2315, p. xii. The police admitted before the Court of Criminal Appeal that a mistake had been made, and the conviction was quashed. Pitty Taylor observes that in no sense is it possible to say that verdicts arrived at by circumstantial evidence amount to absolute certainty. Absolute metaphysical, and demonstrative certainty is, however, not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature. This aspect of the standard of evidence was brought into relief by Lord Coleridge, J., in his summing up in the Newcastle Train Murder Case, July, 1910, which was subsequently alluded to by Lord Alverstone, L. V. J., in the Court of Criminal Appeal, as "one of the most able I have ever read." Lord Coleridge observed : "the law does not demand that they should act on certainties, and upon certainties alone. In the passage of our lives, in our acts, in our thoughts, we do not deal with certainties—we act on just and reasonable convictions founded upon just and reasonable grounds." See 13 Cr. L. J. 86, 87.

(xi) In a case of burglary before the Special Commission at York, January, 1813, a witness stated that a man came into his room in the night, and caused a light by striking on the stone floor with something like a sword, which produced a flash of light near his face and enabled him to observe that his forehead and cheeks were blacked over in streaks that he had on a dark-coloured coat and a dark-coloured handkerchief and was a large man, from which circumstances and from his voice he believed the prisoner to be the same man. The prisoner was acquitted, but, undoubtedly, such evidence has occasionally been acted upon. See 31 State Trials 1124—1135.

(xii) The late learned Recorder of Birmingham (M.D. Hill, Esq., Q.C.) once narrated the particulars of a remarkable case, in which he was retained as counsel for a prisoner accused of shooting at a young woman and in which the intended victim was prepared to swear that she recognized the prisoner by the flash of the gun which was fired at her. The trial, which was to have taken place at the Derby-spring Assizes, (1840) was prevented by the suicide of the prisoner, after the business of the Assizes had begun, but Mr. Hill made a series of experiments with a view to test the possibility of the alleged recognition and the conclusion he drew was "that all stories of recognition from the flash of gun or pistol must be founded upon a fallacy." There were many circumstances in the case calculated to produce a strong impression on the young woman's mind that the prisoner was her assailant and she doubtless mistook the impression so created for ocular demonstration. On the other hand it is asserted in Taylor's Medical Jurisprudence, 6th Ed. 1910 559-560, that from information which the author was able to collect on this point, there appears to be no doubt that an assailant may be thus occasionally identified. It probably depends largely upon the quickness of individual sight. See Wills' Circumstantial Evidence, 6th Ed. p. 183.

(xiii) There are some men with peculiarities and characteristics so marked that only a very careless observer (of whom, however, there are a great number)

could well be wrong about them. There are others—and far great number—whose features and persons are of the very commonest types, and who are hardly distinguishable by a casual observer from hundreds to be met every day in the streets. The physical characteristics of the subject of identification may be of the one category or the other, or may belong to any one of the infinite gradations between the two extremes. Fortunately the tribunal has the advantage of seeing the person sought to be identified, and the foregoing consideration can always be brought home to the minds of the Jurors. *Ibid* p. 384.

(xiv) In one case a gentleman who was shot at while driving home in his gig, and wounded in the elbow, stated that when he observed the flash of the gun, he saw that it was levelled towards him and that the light enabled him to recognize at once the features of the accused. On cross-examination he stated that he was quite sure he could see him, and that he was not mistaken as to his identity, but the prisoner was acquitted. *Reg v. White*, Croydon Summer Assizes, 1839.

(xv) In *Rex v. Brookes*, 31 State Trials 1124, 1135, 1137, it is stated that after condemnation of a man for murder, on the testimony of two witnesses who deposed that they recognised him by the light from the discharge of a gun, experiments were made from which it appeared that such recognition was impossible. *Wills' Circumstantial Evidence*, p. 183.

(xvi) This is a case which remarkably illustrates the difficulties surrounding the determination of personal identity. A man was tried at Manchester for housebreaking. He was convicted. A part of the indictment alleged that he had been previously convicted of a similar offence. A warder from the convict prison from which it was alleged that the prisoner had been discharged on completing his former sentence, deposed that the prisoner was the same man, and that he had served his former sentence as James Williams. The prisoner, who vehemently protested that a mistake had been made, elicited from the warder that upon the discharge of James Williams a list had been made of the marks of identification upon him. The list was produced and the goal surgeon was requested to take the prisoner to the cells and report what marks he had upon him. He returned with the list which differed very materially from the warder's list, containing some obvious marks which were not in the warder's list and not containing others which were in that list. In particular the prisoner had upon his stomach a large mark of discolouration ("probably congenital," said the surgeon) which was not in the warder's list. Photographs of James Williams were produced by the warder and at the request of the Jury the prisoner was placed in various positions, and under various lights for the purpose of comparison. In the end the Jury found that the prisoner was not James Williams, and he received the mitigated sentence due to a first conviction for an offence of this kind. When in prison he memorialised the Home Secretary, complaining of some action on the part of the prison authorities. This led to an investigation, in the course of which a petition from James Williams dated from Chatham convict prison, was found in the archives of the Home Office, and both petitions were sent by the Home Secretary to the Judge who tried the case. There was not then room for the smallest doubt as to the identity of the prisoner with James Williams. Not only were the two hand-writings identical, but there was a peculiar vein of thought and character running through both petitions which could hardly, by any possibility, have been common to two different persons. The man was of the kind known to seamen as "sea lawyers" and with a very peculiar vein of querulousness eminently characteristic. There was not the slightest doubt that the warder was right in his identification. *Ibid*.

(xvii) A Mr. Storrs of Grose Nall, in Cheshire, was murdered in his own house about 9 p. m. on November 1, 1908. The murderer was seen in the kitchen by

the cook, who had a good opportunity of noticing him. Mr. Storrs, hearing a noise came out of the dining room into the passage, where he was immediately attacked by a man who grappled with him, stabbed him with a large knife in some fifteen or sixteen places, and effected his escape. He was lifted up to a sofa, where he died in a few minutes without having been able to say a word. The assault took place near a lamp and was witnessed by his wife, his niece, and two servants, who all swore with more or less confidence to the identity of the murderer with the man who was being tried, and they had been very sure. He, however, successfully established an *alibi* and was acquitted. A few months later suspicion fell upon another man said to resemble the man who had been acquitted, and he was put upon his trial. The same witnesses had, of course, to be called. Their evidence could not, however, come to much more than that there was such similarity that they might have mistaken the one for the other. The general evidence was not of a cogent kind; an *alibi* was set up on this occasion also. Though the authorities could scarcely do otherwise than prosecute, there and never could have been much chance of a conviction and the second prisoner also was acquitted. *See ibid.*

(xviii) Antipholus of Syracuse, the twin brother of Antipholus of Ephesus, experienced some of these inconveniences:—

“There’s not a man I meet, but doth salute me  
As if I were their well acquainted friend;  
And every one doth call me by my name.  
Some tender money to me, some invite me;  
Some other gives me thanks for kindness;  
Some offer me commodities to buy:  
Even now a tailor called me in his shop,  
And showed me silks that he had bought for me,  
And, therewithal, took measure of my body.”

*See Shakespeare’s Comedy of Errors, Act, IV, S. 3.*

(xix) “Two faces, even though there be no relationship between the parties, may be all but indistinguishably alike, so that the one shall frequently be accosted for the other, yet no parity of character can be inferred from this resemblance. Poor Captain Atkins, who was lost in the defence off the coast of Jutland in 1811, had a double of this kind, that was the torment of his life; for this double was a swindler, who, having discovered the lucky facsimileship, obtained goods, took up money, and at last married a wife in his name. Once when the real Captain Atkins returned from a distant station, this poor woman, who, awaiting him at Plymouth, put off in a boat, boarded the ship as soon as it came to anchor, and ran to welcome him as her husband.” (Southey’s “The Doctor,” Vol VII, p. 474, Ed. 1847.) Following this story, Southey gives an account, “cut out of a journal of the day,” of a coroner’s inquest on the body of a girl found drowned, between whom and another young woman living there was a likeness so extraordinary that a number of witnesses, among whom was the mother of the latter, swore positively to the body as that of the girl living. Towards the close of the inquest, however, the girl so supposed to be dead walked into the room, and said to one of the most positive of the witnesses, “How could you make such a mistake as to take another body for mine?” The result was, there was no evidence to prove who the deceased was. *See Ram on Facts, p. 68.*

(xx) In November, 1794, a woman was indicted at the Old Bailey for robbing her ready-furnished lodgings. The prosecutrix swore to the prisoner’s having

taken the lodgings. The prisoner said she had a twin sister, so like her, that their parents could not distinguish them asunder. A man said the sister was in custody for a similar offence; he had seen her, and they were so alike, it was impossible to perceive any difference; under these circumstances, the Jury acquitted the prisoner. She was a second time indicted for a similar offence. The prosecutrix in this case was positive as to her identity. She had seen the sister, who, in order to deceive her, had changed clothes with her sister, but still she pointed her out. She also distinguished their voices, and a degree of hastiness was observed in the sister beyond the prisoner. On this second indictment she was found guilty. *See Ram on Facts*, p. 66.

(xvi) The famous Tichborne trial is not only interesting but instructive. The facts were briefly these:—In April 1854, Roger Tichborne, the heir to the Tichborne baronetcy and estate embarked at Rio on board the *Bella*, which was lost, and for eleven long years nothing was known or heard of him. Suddenly, in Australia, a butcher came from the shambles and announced himself as the long lost heir. He swore that he was Roger Tichborne, the son of the last baronet. In support of this story, he also swore that he had, while on a visit to his uncle, seduced his cousin Kate, and it being suggested to him that he was Arthur Orton, the son of a butcher at Wapping, he swore that he was not. These three things he falsely swore, and those were the three main charges against him. It had been said over and over again by those who had not read the case, this must be the right man, or how could he have known all these things? This is what Mr. Hawkins' cross-examination was directed to, namely, to show that the claimant's knowledge was the knowledge of old Bogle, an old family servant, and not his own, and it will show that the pretended recollection of the claimant is not the recollection of a child grown into a man but of one who was a man when the incidents occurred. The claimant recollected with the crammed mind of a man, and not with the artless memory of a child. The claimant got his information from Bogle. When old Bogle went to the hotel where claimant was staying in Australia, he went to greet Sir Roger rather than to ascertain whether or no it was he. He went "possessed with the idea" that the person who was to meet him was in fact the veritable Roger; and then one of the two things must follow; if he went as a rogue to assist in the perpetration of a fraud, he would willingly communicate all he knew of the family and the estate, and if he went as a fool he could easily be drawn by a cunning imposter to impart the same information. Then we got the cross-examination as to Bogle's first interview with the claimant, thus:—

Q. "You knew the defendant's face at once?" A. "Yes."

Q. "He was exactly like?" A. "Yes; I knew him from his likeness to his uncle."

Q. "And that was how you recognized him?" A. "Yes."

Q. "At first sight?" A. "At first sight."

Q. "Not from his likeness to Roger?" A. "Not exactly."

Q. "There is a good deal of difference between him and Roger, is there not?"

This question was a sort of petard, and Bogle having got ready by the previous questions, must be hoisted upon it, struggle as he may; he struggles thus: A. "He is stouter,"

Q. "A great deal stouter?" A. "No, not a great deal."

Q. "What, was Roger stout?"— A. "No."

Q. "Was he thin?" A. "Yes."

Q. "Very thin?" A. "Yes."

Q. "Narrow-chested; pigeon-chested?" A. "They say so; but I don't think he was by measurement."

Q. "Don't talk of measurement. Was he not narrow in the front part of his chest?" A. "He appeared so."

Q. "Did you think the defendant narrow and pigeon-breasted?" A. "No, he was stouter."

Q. "And broader?" A. "Yes."

Q. "Taller?" A. "No; about the same height."

Q. "Had Roger a long neck?" A. "Well, I don't know if longer than usual. As he was thin it appeared to be so."

Q. "The defendant's did not appear so, did it?" A. "It appeared shorter because he was stout."

Q. "As to the face?" A. "The upper part was like Roger's."

Q. "What do you say to the lower part?" A. "Well, his nose was injured."

Q. "But the lower part—the chin?" A. "It was shorter."

Q. "Roger's was long?" A. "Rather."

Q. "And pointed?" A. "Yes, I think so."

Now a direct point-blank contradiction of what the defendant had sworn in the former trial is obtained in this way.

Q. "Do you know whether he had heard you were in Sydney?"

A. "He had seen Guilfoyle (the old family gardener). I don't know whether Guilfoyle had told him anything. (The dowager's letters to the defendant had mentioned that Bogle was in Sydney and was quite black).

Q. "Did he tell you he knew you were in Sydney?" A. "Yes, he did."

Q. "Did he show you a letter of Lady Tichborne?" A. "He did."

Q. "Did he put the letter into your hand?" A. "Yes."

Q. "Did you read it?" A. "I couldn't, as I had not got my glasses."

Q. "Did he ask you if you knew the handwriting?" A. "Yes, and he told me his mother had written and told him I was there."

Q. "Did he say he had been making inquiries about you?" A. "He said he was going to advertise for me."

The course was thus clear, the cross-examination of the defendant is now referred to, and that portion of it read where the defendant swore that the name of Bogle never had been mentioned to him until he saw him.

"But you knew at the time that Bogle was there?"

"I did not," swore the defendant in his previous examination.

"Had not you received your mother's letter?"

"No, not at that time."

We have then up to this point, upon the facts, Bogle's absolute contradiction of himself with reference to his recognition of the claimant, and his direct contradiction of the claimant with regard to Lady Tichborne's letter, which had informed him that Bogle was in Sydney.

The following further extract from the cross-examination of the same Bogle refers to the important subject of the tattoo marks which were proved to have been upon Roger's arms before he left England. As the defendant had no such marks, Bogle swore that if Roger had ever had such a thing, he, Bogle, must have seen them, for Bogle had been with Roger on three occasions, and had seen Roger's arms bare, and no tattoo mark was there. This positive point blank swearing was dealt with in the following manner:

Q. "You say," asks Mr. Hawkins, "that on each of these occasions Roger had on a pair of black trousers, with his braces tied round his waist?" A. "Yes."

Q. "Was the night shirt buttoned up at the throat?" A. "Yes."

Q. "The sleeves, how were they?" A. "Loose."

Q. "Well?" A. "Well."

Q. "What then? What did you see?" A. "I saw him rub his arms."

Q. "Simply rubbing his arms like this?" A. "He just rubbed one arm and then the other."

Q. "Both at the same time?" A. "No, not both at the same time, first one and then the other."

Q. "Do you know why he rubbed his arm?" A. "I suppose it itched. I don't know."

Q. "But did you think when you saw him rubbing his arm?" A. "I thought he'd got a flea."

Q. "A flea?" A. "Yes I thought so."

Q. "Did you see it?" A. "No, of course not, Mr. Hawkins."

Q. "Whereabouts was it? Just show me."

(Bogle points out the place, just two inches above the elbow.)

Q. "Can you tell me what time this was?" A. "Ten minutes past eleven."

Q. "That was the first occasion?" A. "Yes, but it occurred three times, I have told you."

Q. "And on each occasion you had the same opportunity of seeing his naked arms?" A. "Just the same."

Q. "Now let me come to the second occasion. Did he do the same thing?" A. "He did the same thing."

Q. "Was this about the same time?" A. "About the same time."

Q. "About ten minutes past eleven?" A. "Yes, because I left him about that time."

Q. "I don't want to know your reasons. Did he just rub one arm so, and then the other so?" A. "Yes, he was rubbing his naked arm."

Q. "And each time you had the opportunity of seeing it?" A. "Each time I saw it."

Q. "Rubbed it outside?" A. "I don't know what you mean by outside."

Q. "Did he always put his hand inside?" A. "Inside of a shirt, always put his hand in—I don't know."

Q. "But I want you to know; you recollect it, you say?"

A. "If your shirt was unbuttoned, and you were rubbing your arms, Mr. Hawkins, you would draw your sleeves up."

Q. "Never mind what I should do. I want to know what you say Roger did. Why do you think he rubbed his arm at this time?"

A. "I suppose the same as before."

Q. "A flea?" A. "I suppose so."

Q. "But did you see the flea, Bogle?" A. "I told you, Mr. Hawkins, I did not."

Q. "Excuse me, that was the first one?" A. "Well, this was the same."

Q. "You say there were no buttons on the sleeves, Bogle?"

A. "I don't believe there was, Mr. Hawkins."

Q. "Do you know" asks the counsel, "whether there were buttons or not?" A. "I don't believe it."

Q. "But do you know?" A. "I do not know."

Q. "But I dare say you know this that if a man has no shirtbuttons his sleeves would fall open a good deal?"

A. "I know every man has shirt-buttons, but they come off."

Q. "Where the sleeves made to button?" A. "Yes, of course."

Q. "And on every one of the three occasions it happened to be unbuttoned?" A. "Each time I saw it."

Q. "Now let us come to the third occasion. Do you recollect that?" A. "I do."

Q. "Do you recollect which arm you saw?" A. "I saw both."

Q. "Both arms up to the elbow?" A. "Occasionally."

Q. "Just point out where it was you saw him rubbing?" "That's the same place as before?" A. "The same place."

Q. "The same place on all three occasions?" A. "Yes."

Q. "With sleeves unbuttoned?" A. "Yes."

Q. "Why did you notice them particularly?" A. "If you pull up your sleeves, I can see it without noticing it particularly."

Q. "But you would not notice any arm?" A. "If I was sitting with you, and there were sleeves, and if you rubbed your arms, would I not see you?"

Q. "You would look at the arm and notice it particularly, so as to recollect the circumstance for five-and-twenty years, would you?"

A. "I would be noticing what you are doing."

Q. "Do you seriously mean to say you took notice of his arms?"

A. "I seriously mean to say I saw him rubbing his arms, and saw no marks on them."

Q. "When did you first recall these circumstances to memory?" A. "What circumstances?"

Q. "These summer evening rubbings of his arm in 1851?" A. "I don't know."

Q. "When did you first of all remember it?" A. "I thought of it when I first heard the tattoo marks mentioned."

Q. "Yes?" A. "And I said if he was tattooed I ought to have seen it."

Q. "On the last occasion, did you think it was a flea again?" A. "I suppose so."

Q. "What time was it? About the same time?" A. "Yes."

Q. "Ten minutes past eleven?" A. "Yes."

Q. "Then all I can say is he must have been a very punctua old flea."

Which observation is enough for Bogle and his evidence. It explodes amid a peal of laughter. See Harris, pp, 136-190.

During the Tichborne trial for perjury, a remarkable witness was called, named Luie. He was a shrewd man, and told his tale with wonderful precision and apparent accuracy. That it was untrue there could hardly be a question, but that it could be proved untrue was extremely doubtful and an almost hopeless task. It was an improbable story, but still was not an absolutely impossible one. If true, however, the claimant was the veritable Roger Tichborne, or at least the probabilities would be so immensely in favour of that proposition that no jury would agree in finding he was Arthur Orton. The manner of giving the

evidence was perfect. After the trial one of the jury was asked what he thought of Luie's evidence, and if he ever attached any importance to his story. He said that at the close of the evidence-in-chief he thought it is so improbable that no credence could be given to it; "but" he added, "after Mr. Hawkins had been at him for a day and could not shake him, I began to think if such a cross-examiner as that cannot touch him there must be something in what he says, and I began to waver. I could not understand how it was all lies, it did not break down under such an able counsel." The whole difficulty in exposing the falsity of Luie's evidence in the Tichborne trial consisted in the fact that the circumstances *outside the events deposed to* were so remote that all connection was destroyed. No ingenuity or ability could reach them without some connecting link. The sole spectator of the events was in the witness-box and he took care to separate them from every other event in his life and from every circumstance that could be contradicted. No materials for cross-examination were before the eminent counsel for the prosecution, and the facts that subsequently came to light, by the merest accident in the world, were at that time absolutely inconceivable. See Harris on Hints on Advocacy, 14th Ed., 1911, pp. 67—69.

(xxii) In the trial of Hoffman a prosecution witness testified that she had seen the accused who was driving a car, stop and pick up the murdered woman and ride away with her. She had identified the accused and his car from pictures in the newspapers published subsequently to the crime. The Defence Counsel suspected that the girl had some doubts about her identification and that she had not ample opportunity to compare the picture in the paper with the man whom she had seen driving the car. He thought that the memory of the girl was exceedingly poor. He commenced the cross-examination in a very friendly spirit in order to gain her full confidence.

Q. Let's see. It was at the police station that you first identified him, wasn't it? A. Yes.

Q. What officers were present when you got there? A. I didn't take notice.

Q. Do you know Police Inspector Ernest Van Wagner captain of detectives? A. Yes.

Q. Wasn't he there? A. Yes.

Q. After you had viewed Hoffman the first time at the police station, didn't you say so Captain Van Wanger, "No, sir, that is not the man"? A. Yes.

Q. And then didn't you view Hoffman the second time and say to Captain Van Wanger, "That isn't the man"? A. Yes.

Q. You saw only one side of the man's face, didn't you? A. Yes.

Q. And you really don't remember which side you saw? A. No.

Q. The picture you saw in the papers one month later showed a front view of Hoffman's face? A. Yes.

Q. Did you ever live in Mersereau avenue? A. Yes.

Q. Do you remember the number? A. No.

Q. Do you remember how many rooms there were in the apartment? A. No.

Q. You lived in Bloomfield avenue five years ago? A. I think so.

Q. Do you remember the number? A. No.

Q. Did you attend Public School Number Six in Manhattan? A. Yes.

Q. What was the location? A. I don't remember it,



- Q. You testified at Hoffman's third trial in 1928 ? A. Yes.  
 Q. What month was it ? A. April or May.

## CHAPTER 47

## As to Identification of Things

A thing is sometimes singular or rare ; as either in size, shape or colour, or as the production of a foreign country and in these cases the singularity or rarity of it may make a deep impression and this impression retained in the memory may render it easy to recognise the thing. Often a thing is not singular or rare, but one of a multitude of other things in most respects like it ; as the manufactured goods of particular trades, be they clothing, household furniture, tools of trade or husbandry, or things of any other kind ; and in this case if there is some striking difference distinguishing it from others of its kind or species, as something wanting or superfluous in it or some mark purposely made on or accidentally acquired by it as a stamp or stain, the difference may be strongly impressed on the mind, and being remembered will much facilitate the power to recognise the particular thing. *Ram on Facts*, p. 50. Sometimes a person, by constant use of a thing becomes very familiar with it and can identify it although it has no particular distinguishing mark on it. A workman can easily identify his tool and other people their dress and other things by very frequently seeing, handling or using them.

## Evidence in Theft Cases

Evidence of identity is easily procurable. 25 P. R. 1883 (Cr.).

If the identity of stolen goods is doubtful conviction can be set aside even in revision. 194 P. L. R. 1912. It is wholly insufficient to prove that property stolen was very much like that produced. 29 I. C. 72. The distinctive names of stolen goods must be given in the list of stolen articles. 1921 P. 499. The evidence of a witness that complainant or somebody else identified the recovered stolen property is inadmissible as hearsay. 1924 L. 727 : 25 Cr. L. J. 1847. If the case entirely depends on evidence of identity, it is generally of difficult and unsatisfactory nature. 17 P. R. 1868. List of stolen property handed over to police during investigation is inadmissible. 1929 C. 488 ; 1932 L. 488 ; 1925 C. 959, *but see* 1933 L. 987.

## Of Grain, Cloth and Goods of Common Pattern

Cereals cannot be identified. 57 I. C. 913. Grain is not capable of identification. 1 Weir 429. Identification of ordinary clothes is impossible. 1922 A. 24 : 28 Cr. L. J. 193. The fact that cloth found in the house of accused answers to the general description of the stolen clothes as given by the complainant is not sufficient proof of identity and that the cloth found had a particular stamp on it is not a sufficient proof. 1 L. 102 57 I. C. 167.

A village shoe-maker who makes one pair of shoes every week for villagers cannot identify it from another as belonging to a particular person. 1935 L. 805 (806) : 160 I. C. 187. Sugar is not capable of identification but the find of large quantity of sugar with the accused may be corroboration of prosecution story. 9 P. 606 : 1930 P. 513. Sweets cannot be identified. 94 P. L. R. 1912. If goods of common pattern are found with the accused, he cannot be convicted. 1923 L. 36. A thing is sometimes singular or rare, as either in size, shape or colour, or as the production of a foreign country which may make deep impression to make recognition easy. *Ram on Facts*, p. 87, Art of Cross-examination by P. R. Aiyar, 1920, p. 544. Manufactured goods of particular trade as of clothing, house-hold furniture, tools of trade or husbandry or things

of other kind cannot be recognized unless there is some striking difference distinguishing it from others of its kind or species *e.g.*, accidental stamp or stain or something wanting or superfluous in it. *Ibid*, p. 544. By constant use a thing can be recognized. A carpenter, a mason or a workman by remembrance of their general appearance can recognize his tools and most people their dress and other things by frequently seeing, handling or using them. *Ibid*, p. 544. Where stolen article is of ordinary make and there is nothing peculiar in it, the evidence of a complainant—a person of ordinary position, as to its identification is not sufficient. 22 P. W. R. 1912 (Cr.): 13 Cr. L. J. 555, 1923 L. 16. But it is a matter of common experience that owners of articles can easily identify them by their shape, feel etc., although they are of common pattern. 1943 p. 424. Where witness had chance of seeing the thing before test identification its of little value. 1945 O. 164.

### Of Written Documents by Illiterate Persons

A written document may be sufficiently identified by a witness to be laid before the Jury, although the witness is unable to read. He would still have the size, colour and general appearance of the paper, the colour of the ink, and the size and general characteristics or appearance of the writing to compare with his mental picture. For example, one might be allowed to testify to the identity of a paper written in Greek, Hebrew, Sanskrit, or Egyptian hieroglyphics, although unable to read a word of either language. Cowper's Works (Letters), Vol. 5, p. 217, Ed. 1836.

### Of Ornaments or Jewellery

Women can always identify their jewellery even of common pattern. 1926 L. 132 : 26 Cr. L. J. 1361. But sometimes they jump to a conclusion on account of self-interest, because if they depose otherwise they might lose it.

### Illustrations

(i) In a very recent case where a clever thief had been convicted of looting various apartments in New York City, over eighty thousand dollars' worth of jewellery, the female owners were summoned to identify their property. In every instance these ladies were absolutely ingenuous and intended to tell the absolute truth. Each and every one positively identified various of the loose stones found in the possession of the prisoner as her own. This was the case even when the diamonds, emeralds and pearls had no distinguishing marks at all. It was a human impossibility actually to identify any such objects and yet these eminently respectable and intelligent gentlewomen swore positively that they could recognize their jewels. They drew the inference merely that as the prisoner had stolen similar jewels from them these must be the actual ones which they had lost, an inference very likely correct, but valueless in a tribunal of justice. One of the ladies referred to testified as follows:—

Q. "Can you identify that diamond?" A. "I am quite sure that it is mine."

Q. "How do you know?" A. "It looks exactly like it."

Q. "But may it not be a similar one and not your own?" A. "No; it is mine."

Q. "But how? It has no marks?" A. "I don't care. I know it is mine. I swear it is."

The good lady supposed that, unless she swore to the fact, she might lose her jewel; which was, of course, not the case at all, as the sworn testimony founded upon nothing but inference left her in no better position than she was in before. 4 Cr. L. J. pp. 3—6.

(ii) In a case of murder, in which a witness had sworn to the body of the deceased by certain work which he had done to the dress in which the body was clad, the question was asked :—

Q. "Do not all dress-makers sew pretty much alike?" A. "Yes."

Q. "How, then can you say this work is yours?"

A. "Because I know my work from everybody else's."

(iii) Professor Claparede made some experiments by exhibiting a mask to students in his class room, afterwards requesting them to pick it out from ten masks which he showed them. Five of the twenty-three students selected the correct mask, eight picked it out as one of several, generally two or three; and ten did not pick out the right mask at all, either by itself, or as one of several. See Prof. Claparede "What is the Value of Evidence?" The Standard Magazine, September 1907, p. 148.

(iv) O'Connell was employed in defending a prisoner who was tried for murder. The principal witness swore strongly against the prisoner, the prisoner's hat was found near the place where the murder was committed. The witness swore positively that the hat produced was the one found, and that it belonged to the prisoner, whose first name was James.

Q. "By virtue of your oath, are you positive that this is the same hat?"

A. "I am."

Q. "Did you examine it carefully before you swore in your information that it was the property of the prisoner?" A. "I did."

Q (taking up the hat and examining the inside carefully, at the same time spelling aloud the name "James"). "Now let me see—'J-A-M-E-S'—do you mean those letters were in the hat when you found it?" A. "I do."

Q. "Did you see them there?" A. "I did."

Q. "And you are sure that is the same hat?" A. "I am sure."

O'Connell (holding up the hat to the bench). "Now, my lord, I submit this is an end of this case. There is no name whatever inscribed in this hat." See Wellman, p. 162.

## CHAPTER 48

### As to Incriminating Questions

S. 132, Indian Evidence Act, reads :—"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind : "Provided that no such answer, which is witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

Compulsion may be implied or explicit and in every case it is a question of fact whether there was or was not compulsion. A witness who answers questions put to him without seeking the protection of S. 132 by objecting to the question put or requesting to be excused, is not entitled to the protection. 52 M. 432, 40 A. 271, 16 A. 88, 3 M. 271, 1926 M. 906, 1924 A. 381, 1934 S. 114 : 22 Cr. L. J. 68, 15 M. 63, 12 B. 440, 21 C. 392, 32 C. 756, 31 C. 715, 1933 O. 370, 43 A. 92, 50 B. 162. Mere record of a deposition is not by itself sufficient evidence of compulsory or voluntary nature of the statement of a witness. 1928 N. 58 : 105 I. C. 820 : 28 Cr. L. J. 996.

A witness giving out in examination-of-chief that a woman had miscarriage without any knowledge whether she was married or not and when her character was not in issue, is not protected unless the Judge himself asked the question. 1930 A. 493 :

Relevant statements made by a witness on oath in a Judicial proceedings are not protected when he has not objected to answering the questions put to him. 50 B. 162 : 1926 B. 141 : A voluntary statement by a witness may stand on a totally different footing to an answer given by him to a question put by Court or Counsel on either side on a point which is relevant to the case. In the latter case he is protected under S. 132, although he may not have objected to the question being put to him. 43 A. 92 : 1921 A. 362, 3 M. 271, 16 A. 88, 40 A. 271 and 22 A. 257 Diss. from. Protest by a witness is not necessary for the benefit of privilege under S. 132, when he answers a question put by Court or Counsel on a relevant point. 1921 A. 362.

When the incriminating questions were objected to by Pleader and the objection was overruled, held, that the accused was compelled to answer within the meaning of S. 132 and the answers could not be proved against him. 37 C. 878. 1935 B. 186.

S. 148 gives the Magistrate power to compel or excuse an answer so far as it affects the credit of the witness, though not a question relevant to the matter in issue. 3 M. 271. The objection may come from the Pleader representing the witness. 37 C. 878. Where a witness answers a question put by Court, he must be deemed to have been compelled to answer, and is entitled to privilege although he did not object. 1934 O. 386, 43 A. 92, 42 A. 257, 37 C. 878 Foll. 1938 O. 370 : 36 Cr. L. J. 71 Dist.

If a person was compelled to answer a question he cannot be prosecuted for defamation. 40 A. 271, 50 B. 162, 52 M. 432. 1939 R. 371 but a witness actuated by a malicious motives making voluntary and irrelevant statement not elicited by questions put to him, is guilty of defamation. He cannot claim privilege. 1928 N. 58 : 28 Cr. L. J. 996. A person making a defamatory statement as a party or witness is liable under S. 500, Penal Code, irrespective of the liability for perjury. He can be protected if he succeeds in applying any of the exceptions mentioned in S. 499. 7. P. W. R. 1911 Cr. : 12 Cr. L. J. 193 : 10 L. C. 682.

The Judge should advise the witness of his right to claim privilege. 10 B. 185. Where the witness in a proceeding between himself and his brother was repeatedly asked questions suggestive of unchastity of his brother's wife and answered that he was not pulling on well with his own wife as he had illicit connection with his brother's wife, it was held that he was compelled to answer the question. Whether answer was deliberately false was quite irrelevant. 1943 P. 117=44 Cr. L. J. 391.

Witnesses cannot be asked questions which tend to criminate themselves, but whether they may be asked if they have already received a punishment, which does not disqualify their testimony, or whether they may be interrogated as to any circumstances of improper conduct, not immediately connected with the subject of their examination, and also, whether their refusal to answer inquiries upon these subjects can be observed upon as affecting the credit of their testimony, are questions of great importance upon which there is a very considerable difference of opinion. Some judges are very strongly of opinion, that these inquiries ought not to be allowed ; but it has been understood to be the more prevalent opinion, and is clearly supported by the course of practice which has actually prevailed that these inquiries should be admitted. Mr. Peake, in the second edition of his 'Law of Evidence,' states the argument in support of these

opposite opinions, in a very fair and perspicuous manner; and the right and propriety of the examination alluded to are maintained with considerable ability in a pamphlet entitled, 'An Argument in favour of the rights of Cross-Examination.' I have at all times felt a very considerable difficulty in the consideration of this subject, but as a knowledge of a witness's habits and pursuits, his conduct and disposition, will naturally influence the regard which is paid to his assertions, I think that the preponderance of argument is in favour of the opinion, that an examination, by which these may be ascertained cannot, upon any general principles, be suppressed as irrelevant or improper; and that those arguments respecting a witness's conduct ought not to be rejected, which may tend to terminate the regard that the mind, without reference to technical rules or legal considerations, would pay to his testimony. At the same time, I think that this is a liberty which, like all others, will be best secured by a cautious vigilance in repressing its abuse, by refusal of advocates to adopt the passions and prejudices of their clients, and to injure a witness by reproaches and insinuations, that cannot reasonably be expected to influence the fair decision of the cause; and by the Court showing a marked discountenance to the adoption of a different line of conduct, calculated only to occasion an unnecessary pain and injury to the witness, without promoting the right or interests of the party.

## CHAPTER 49.

### As to Insanity

*Pretended* :—When an accused person pretends insanity, it is very difficult to find out, whether he is really suffering from the malady or is only an imposter. The cross-examiner or investigating officer has to make a thorough observation of his movements for some time, because in pretended insanity the accused acts in an intelligent manner when unobserved. In order to test whether the insanity is pretended or not, the following extracts will throw some light on the subject:—The test is whether the accused would have committed the act if a policeman would have been at his elbow. 1928 C. 238 : 114 I. C. 159 : 30 Cr. L. J. 247. Medical test is different from legal test. 94 P. L. R. 1909. Unsoundness of mind must be such as to impair cognitive faculties of the accused. 30 P. R. 1878 Cr. Insanity is the disease of mind which deprives a person of the faculty of distinguishing right from wrong or of discerning the nature and quality of his act. 9 Mys. L. J. 28. To test feigned insanity the following points should be considered :—(a) Insanity is usually pretended after the act and not before. (b) A person feigning admits his insanity. (c) Insane persons sleep but little and the sleep is disturbed. An imposter sleeps soundly. (d) An imposter acts his part when he is observed. (e) An imposter will at once show by his countenance and his eyes that there is an intelligent understanding of the conversation affecting him. (f) Insanity may be detected from handwriting. An insane person cannot write a connected sentence, for he forgets the first portion. (g) Eccentricity and unusual habits may be genuine or assumed. They do not constitute unsoundness of mind. Taylor's Medical Jurisprudence, pages 508, 509, 538, 539, 540.

Whether the murder was the result of insanity or not, the following factors should be taken into consideration :—(a) Personal history of the man as to whether he was eccentric, melancholic, degenerate, neurasthenic or in any other way affected by mental diseases. (b) Absence of motive. (c) An insane murderer does not try to conceal the body of his victim. (d) He does not attempt to evade the law by destroying evidence of his crime or by running away from the scene of murder. (e) A sane person usually murders his enemy or one against whom he has a grievance, but he does not shed blood unnecessarily. (f) An insane person may kill several persons including friends and relatives for

whom he has a great regard. (g) An insane person does not make pre-arranged plan to kill anybody. (h) An insane person has no accomplice in the criminal act. (i) Lunatics in asylums never conspire to escape or kill the Superintendent or his assistant. Medical Jurisprudence and Toxicology by Dr. Modi (Ed. 4, 1932, P. 529 *et seq.*)

Some of the tests given in Taylor's Principles and Practice of Medical Jurisprudence (Ed. 8, Vol. I, 1928 at Pages 792—843—844, 846 and 847), are as follows:—(a) The lack of the power of combination is perhaps of all others the most striking characteristic of insanity. Hence it is a rule that when a lunatic commits crime he does not confide in anybody; obviously the same may be true of a sane criminal, so that the point standing alone is of little weight. (b) The crime of a lunatic is frequently without motive or rather it is in opposition to anything that could be called a sane motive. (c) The victims of the criminal are those who oppose his desires or his wishes—the victims of the maniac are among those who are either indifferent to or who are the most near to him. (d) "The lunatic seeks no escape, delivers himself to justice and acknowledges the crime laid to his charge." (e) 'By a sane criminal every attempt is generally made to conceal all traces of the crime and he denies it to the last.'

Insanity is often pretended both by the accused and the witness. The detection of such pretended insanity is one of the most difficult tasks for the cross-examining counsel as well as the investigating officer.

Dr. Hans Gross says: "It frequently happens that a person under examination makes himself out to be a bigger fool than he really is, this is often very advantageous for the accused and some of the witnesses; but for the Investigating Officer it is as troublesome as dangerous. For the guilty man the advantage is two-fold; on the one hand he may hope not to be suspected of an offence requiring perhaps a considerable amount of ingenuity for its accomplishment; and on the other hand he manages to be thought unable to understand a simple question, and so gains time for reflection. A similar pretence is perhaps quite as convenient to the witness who, for some reason or other, does not wish to speak the truth; perhaps he wishes to shield the accused, perhaps he is afraid of contradicting another witness. However wearying and annoying such a pretence may be, an Investigating Officer of ordinary sharpness with a minimum of psychological knowledge will easily discover the trick.

Two methods may be adopted, but both lead to the same goal: proof of contradiction. In the one this contradiction occurs between different statements, some of which are deliberate and cunning, while others are awkward and stupid. In the other the contradiction is found between the words and the expression in the eyes of the person interrogated. As to the former method, it will be difficult for the cleverest person especially in the course of a long examination not to give, at least once, an intelligent answer. The Investigating Officer must know how to entangle a witness, provoke him about the case, lead him on to show himself in his true colours, and if he extracts but one answer more intelligent than the rest, he may safely conclude that the man is shamming. It is the same with the antagonism between look and word, between eye and mouth. No intelligent man has an idiot's eyes and no idiot has intelligent eyes. The whole physiognomy, the deportment, the gestures may deceive, the eyes never; and whoever is accustomed to watch the eyes will never be taken in. It is true that what we call "the expression of the eyes" exists only partially in the eyes themselves; the parts neighbouring on the eye produce the chief effect, and these parts can be transformed at pleasure by means of the corresponding muscles; but this forced change cannot last long nor be mistaken for a genuine expression. A comedian of a most intelligent countenance, can often make himself look a thorough ass, but his eyes, despite all his art, will be never truly

brutish for more than a few moments. If then we have the least suspicion that the person we are interrogating is trying to make himself out a fool, we have only persistantly to keep our eye on him, and however hard he tries to appear stupid and indifferent, he will be unable, especially if he finds himself cornered, to prevent at least one intelligent glance escaping. Remember also that the shammer, when he thinks no one is looking, casts a swift and scrutinising glance on the Investigating Officer to see whether or not he believes him. If the Investigating Officer catches but one of these glances, he can no longer have any doubt as to his man. If he be certain the man is shamming, he very speedily tells him straight that he is found out. The Investigating Officer will then explain to the suspect why he does not believe him, will impress upon him the consequence of the attitude he has assumed, will continue his examination without bothering about the pretended idiocy, and frame his questions to suit the intelligence he may reasonably conclude the man to possess." See Hans Gross, *Criminal Investigation*, pp. 322-323.

### Illustration.

As an illustration of the exposure of an accused person who pretended insanity as an excuse for the crime, the following extracts from the trial of Charles J. Guiteau for the assassination of President Garfield, will be useful. Guiteau's claim was that he shot the President acting upon what he believed to be an inspiration,—a divine command, which controlled his conscience, overpowered his will, and which it was impossible for him to resist. Guiteau openly avowed the act of killing, but imputed the blame to the Almighty. The defence, therefore, was moral insanity. The cross-examination of Guiteau by Mr. John K. Porter is one of the great masterpieces of forensic skill. Mr. Porter's cross-examination showed Guiteau to be a beggar, a hypocrite, a swindler; cunning and crafty, remorseless, utterly selfish from his youth up, low and brutal in his instincts, inordinate in his love of notoriety, eaten up by a love of money.

Q. "Did you say, as Mr. John R. Scott swears, on leaving the depot on the day of the murder of the President, 'General Arthur is now the President of the United States'?" A. "I decline to say whether I did or not."

Q. "You thought so, did you not? You are man of truth." A. "I think I made a statement to that effect."

Q. "You thought you had killed President Garfield?" A. "I supposed so at the time."

Q. "You intended to kill him?" A. "I thought the Deity and I had done it, Sir."

Q. "Who bought the pistol, the Deity or you?" A. (Excitedly) "I say the Deity inspired the act and the Deity will take care of it."

Q. "Who bought the pistol, the Deity or you?" A. "The Deity furnished the money by which I bought it as the agent of the Deity."

Q. "I thought it was somebody else who furnished the money." A. "I say the Deity furnished the money."

Q. "Did Mr. Maynard lend you the money?" A. "He loaned me £15, yes, sir; and I used £10 of it to buy the pistol."

Q. "Were you inspired to borrow the £15 of Mr. Maynard?" A. "It was of no consequence whether I got it from him or somebody else."

Q. "Were you inspired to buy that British bull-dog pistol?" A. "I had to use my ordinary judgement as to ways and means to accomplish the Deity's will."

Q. "Were you inspired to remove the President by murder?" A. "I was inspired to execute the divine will."

Q. "By murder?" A. "Yes, sir, so-called murder."

Q. "You intended to do it?" A. "I intended to execute the divine will, sir."

Q. "You did not succeed?" A. "I think the doctors did the work."

Q. "The Deity tried, and you tried, and both failed, but the doctors succeeded?" A. "The Deity confirmed my act by letting the President down as gently as He did."

Q. "Do you think that it was letting him down gently to allow him to suffer with torture, over which you professed to feel as much solicitude, during those long months?" A. "The whole matter was in the hands of the Deity. I do not wish to discuss it any further."

Q. "Did you believe it was the will of God that you should murder him?" A. "I believe that it was the will of God that he should be removed, and that I was the appointed agent to do it."

Q. "Did he give you the commission in writing?" A. "No, sir."

Q. "Did he give it in audible tone of voice?" A. "He gave it to me by his pressure upon me."

Q. "Did he give it to you in a vision of the night?"

A. "I don't get my inspirations in that way."

Q. "Did you contemplate the President's removal otherwise than by murder?" A. "No, sir, I do not like the word murder. I don't like that word. If I had shot the President of the United States on my own personal account, no punishment would be too severe or too quick for me; but acting as the agent of the Deity puts an entirely different construction upon the act, and that is the thing that I want to put to this Court and the jury and the opposing counsel. I say this was an absolute necessity in view of the political situation, for the good of the American people, and to save the nation from another war. That is the view I want you to entertain, and not settle down on a cold-blooded idea of murder."

Q. "Do you feel under great obligations to the American people?"

A. "I think the American people may sometime consider themselves under great obligations to me, sir."

Q. "Did the Republican party give you an office?"

A. "I never held any kind of political office in any life, and never drew one cent from the Government."

Q. "And never desired an office, did you?"

A. "I had some thought about the Paris consulship. That is the only office that I ever had any serious thought about."

Q. That was the one which resulted in the inspiration, wasn't it.

A. No, sir, most decidedly not. My getting it or not getting it had no relation to my duty to God and to the American people.

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Q. "On the 16th of June, in an address to the American people, which you intended to be found on your person after you had shot the President, you said, 'I conceived the idea of removing the President four weeks ago.' Was that a lie?"

A. "I conceived it, but my mind was not fully settled on it. There is a difference in the idea of conceiving things and actually fixing your mind on them. You may conceive the idea that you will go to Europe in a month, and you may not go. That is no point at all."



Q. "Then there was no inspiration in the preceding May, as you have described?" A. "It was a mere flash."

Q. "It was an embryo inspiration?" A. "A mere impression that came into my mind that possibly to might to be done, I got the thought, and that is all I did get at that time."

Q. "Don't you know when you were inspired to kill the President?" A. "I have stated all I have got to say on that subject. If you do not see it, I will not argue it."

Q. "Do you think you do not know when you were inspired to do the act?" A. "After I got the conception, my mind was being gradually transformed, I was finding out whether it was the Lord's will or not. Do you understand that? And in the end I made up my mind that it was His will. That is the way I test the Lord?"

Q. "What was your doubt?" A. "Because all my natural feelings were opposed to the act, just as any man's would be."

Q. "You regarded it as murder, then?" A. "So-called, yes, sir."

Q. "You knew it was forbidden by human law?" A. "I expected the Deity would take care of that. I never had any conception of the matter as a murder?"

Q. "Why then were you in doubt?"

A. "My mind is a perfect blank on that subject, and has been."

Q. "The two weeks of doubt I am referring to, your mind is not a blank as to that; for you told us this morning how during those two weeks you walked and prayed. During that time did you believe that killing the President was forbidden by human law?" A. "I cannot make myself understood any more than I have. If that is not satisfactory, I cannot do it any better."

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Q. "You mentioned the other day that you never struck a man in your life. Was that true?"

A. "I do not recall ever striking a man sir, I have always been a peaceable man, naturally very cowardly, and always kept away from any physical danger."

Q. "But morally brave and determined?" A. "I presume so, especially when I am sure the Deity is back of me."

Q. "When did you become sure of that?" A. "I became sure of it about the first of June as far as this case is concerned."

Q. "Before that you did not think He was back of you? Whom did you think was back of you with a suggestion of murder?"

A. "It was the Deity, sir, that made the original suggestion."

Q. "I thought you said that the Deity did not make the suggestion until the first of June?" A. "I say that the Deity did make the suggestion about the middle of May, and that I was weighing the proposition for two weeks succeeding. I was positive it was the will of the Deity about the first of June."

Q. "Whose will did you think it was before that?"

A. "It was the Deity's will, No doubt about that."

Q. "But you were in doubt as to its being His will?"

A. "I was not in any doubt."

Q. "Not even the first two weeks?" A. "There was no doubt as to the inception of the act from the Deity; as to the feasibility of the act, I was in doubt."

Q. "You differed in opinion, then, from the Deity?" A. "No, sir, I was testing the feasibility of the act,—whether it would be feasible."

Q. "Did you suppose that the Supreme Ruler of the Universe would order you to do a thing which was not feasible?"

A. "No, sir, in a certain sense I did not suppose it. He directed me to remove the President for the good of the American people."

Q. "Did He use the word 'remove'?" A. "That is the way it always came to my mind. If two men quarrel, and one kills the other, that is murder. This was not even a homicide, for I say the Deity killed the President, and not me."

Q. "Passing from that, your friend Thomas North—" A. "He is no friend of mine."

Q. (Continuing). "At page 423 of the evidence, Thomas North says that in 1859 you struck your father from behind his back. Is that true?" A. "I know nothing about it."

Q. "He swears that you clinched your father after he had risen, and that several blows were interchanged. Is that true?"

A. "I have no recollection of any such experience, sir, at any time. I have no recollection about it."

Q. "Your sister swears that in 1876 when you were thirty-five years old, that at her place, while you were an inmate of her family, you raised an axe against her life. Is that true?" A. "I don't know anything about it."

Q. "You heard the testimony, didn't you?" A. "I heard it."

Q. "You heard your lawyer, in his opening, allude to that evidence, and you shouted out at the time that it was false?"

A. "That is what I did say, but you need not look so fierce on me. I do not care a snap for your fierce look. Just cool right down I am not afraid of you, just understand that. Go a little slow. Make your statements in a quiet, genial way."

Q. "Well, it comes to this then, you thought God needed your assistance in order to kill President Garfield?"

A. "I decline to discuss this matter with you any further."

Q. "You thought that the Supreme Power, which holds the gifts of life and death, wanted to send the President to Paradise for breaking the *unity* of the Republican Party, and for ingratitude to General Grant and Senator Conkling?" A. "I think his Christian character had nothing to do whatever with his political record. Please put that down. His political record was in my opinion very poor, but his Christian character was good. I myself looked upon him as a good Christian man. But he was President of the United States, and he was in condition to do this republic vast harm, and for this reason the Lord wanted him removed, and asked me to do it."

Q. "Have you any communication with the Deity as to your daily acts?"

A. "Only on extraordinary actions. He supervises my private affairs, I hope, to some extent."

Q. "Was He with you when you were a lawyer?" A. "Not especially."

Q. "When you were an unsuccessful lawyer?" A. "Not especially."

Q. "Was He with you when you were a pamphlet pedler?" A. "I think He was, and took very good care of me."

Q. "He left your bills for boarding and lodging unpaid?"

A. "Some of them were paid. If the Lord wanted me to go around preaching the gospel, as I was doing as a pamphlet pedler, I had to do my work, and

let Him look after the result. That is the way the Saviour and Paul got in their work. They did not get any money in their business, and I was doing the same kind of work."

Q. "I think you were kind enough to say that the Saviour and Paul were vagabonds on earth?" A. "That is the fact, I suppose, from the record. They did not have any money or any friends."

Q. "Do you think that is irreverent?" A. "Not in this case. I think it is decidedly proper, because the Saviour Himself said that He had nowhere to lay His head. Is not that being a vagabond?"

Q. "Did you think it was irreverent when you said you belonged to the firm, or were working for the firm, of 'Jesus Christ and Company'?" A. "It is barely possible I may have used that expression in one of my letters years ago."

Q. "Did you not hear such a letter read on this trial?"

A. "If I wrote it, I thought so."

Q. In your letter to the American people, written on sixteenth of June, more than two weeks before the assassination, did you say, 'It will make my friend Arthur President'?" A. "I considered General Arthur my friend at that time and do now. He was a Stalwart. and I had more intimate personal relations with him that I did with Garfield."

Q. "Had General Arthur, now President, ever done anything for you?"

A. "Not especially, but I was with him every day and night during the canvass in New York except Sundays. We were Christian men there and we did no work on Sundays."

Q. "You never had any conversation with him about murder, did you?"

A. "No, sir, I did not."

Q. "Did you, in this letter of the sixteenth of June, say, 'I have sacrificed only one'?" A. "I said one life. The word 'life' should be put in."

Q. "That is implied, but not expressed?" A. "Now I object to your picking out a sentence here and there in my letter. You want to read the entire letter. I said something there about General Arthur and General Grant. You have left all that out. You are giving a twist on one word. I decline to talk with a man of that character."

Q. "Did you think you had sacrificed one life?" A. "I can remember it. This is the way (dramatically).—This is not murder. It is a political necessity. It will make my friend Arthur President and save the Republic. Grant, during the war, sacrificed thousands of lives to save the Republic. I have sacrificed only one (Cooly.) Put it in that shape and then you will get sense out of it."

Q. "When you sacrificed that one life, it was by shooting him with the bull-dog pistol you bought?" A. "Yes, sir, it was. That should have been my inspiration. Those are the words that ought to go in there, meaning the Deity and me, and then you would have got the full and accurate statement. I do not do this work on my own account, and you cannot persuade this Court and the American people ever to believe I did. The Deity inspired the act. He has taken care of it so far, and He will take care of it."

Q. "Did the American people kill General Garfield?" A. "I decline to take to you on that subject, sir. You are a very mean man and a very dishonest man to try to make my letters say what they do not say. That is my opinion of you, Judge Porter. I know something about you when in New York. I have seen you shake your bony fingers at the Jury and the Court, and I repudiate your whole theory on this business."

Q. "Did it occur to you that there was a Commandment 'Thou shalt kill'?" A. "It did. The divine authority overcame the written law."

Q. "Is there any higher divine authority than the authority that spoke in the Commandments?" A. "To me there was, sir."

Q. "It spoke to you." A. A special divine authority to do that particular act, sir."

Q. "And when you pointed that pistol at General Garfield and sent that bullet into his backbone, you believed that it was not you but God that pulled the trigger?" A. "He used me as an agent to pull the trigger,—put it not that shape,—but I had no option in the matter. If I had, I would not have done it. Put that down."

Q. "Did you walk back and forth in front of the door of the ladies' room, watching for the entrance of the President?" A. "I walked backwards and forwards, working myself up, as I knew the hour had come."

Q. "Was it necessary to do that to obey God?" A. "I told you I had all I could possibly do to do the act anyway. I had to work myself up and rouse myself up."

Q. "Why?" A. "Because all my natural feelings were against the act, but I had to obey God Almighty if I died the next second, and God had put the work on to me, and I had to do it."

Q. "Did you mind about dying the next second?" A. "I knew nothing about what would become of me, sir."

Q. "Why did you engage that colored man? Was it to drive you to a place of safety?" A. "I engaged him to drive me to the jail."

Q. "Did you think you would be safer there?" A. "I did not know but that I would be torn to pieces before I got there."

Q. "Weren't you a little afraid of it after you got there?" A. "I had no fear about it at all, sir."

Q. "Why did you write to General Sherman to send troops?" A. "I wanted protection, sir."

Q. "Protection where there was no danger?" A. "I expected there would be danger, of course."

Q. "Why should there be danger?" A. "I knew the people would not understand my view about it, and would not understand my idea of inspiration, that they would look upon me as a horrible wretch for shooting the President of the United States."

Q. "As a murderer?" A. "Yes, I suppose that is so."

Q. "Did you suppose they would hang you for it?" A. "No, Sir. I expected the Deity would take care of me until I could tell the American people that I simply acted as His agent; hence, I wanted protection from General Sherman until the people cooled off and got possession of my views on the matter. I was not going to put myself in the possession of the mob wild. I wanted them to have time to tone down so that they could have an opportunity to know that it was not my personal act, but it was the act of the Deity and me associated, and I wanted the protection of these troops, and the Deity has taken care of me from that day to this."

Q. "Have you any evidence of that except your own statement?" A. "I know it as well as I know that I am alive."

Q. "It depends upon whether the jury believe that."

A. "That is just what the jury is here for,—to take into account my actions for twenty years, my travelling around the country and developing a

new system of theology, and the way the Deity has taken care of me since the second of July, and then the jury are to pass upon the question whether I did this thing jointly with the Deity, or whether I did it on my own personal account. I tell you, sir, that I expect, if it is necessary, that there will be an act of God to protect me from any kind of violence, either by hanging or shooting."

Q. "Did the Deity tell you that?" A. "That is my impression about it."

Q. "Oh, it is your impression. Have you not had some mistaken impressions in the course of your life?" A. "Never, sir, in this kind of work. I always test the Deity by prayer."

Q. "Why did you think you would go to jail for obeying a command of God?" A. "I wanted to go there for protection. I did not want a lot of wild men going to jail there. I would have been shot and hung a hundred times if it had not been for those troops."

Q. "Would there have been any wrong in that?" A. "I won't have any more discussion with you on this sacred subject. You are making light of a very sacred subject and I won't talk to you." Q. "Did you think to shoot General Garfield without trial—"

A. (Interrupting). "I decline to discuss the matter with you, sir."

Q. "Had Garfield ever been tried?"

A. "I decline to discuss the matter with you, sir."

Q. "Did God tell you he had to be murdered?"

A. "He told me he had to be removed sir."

Q. "Did He tell you General Garfield had to be killed without trial?" A. "He told me he had to be removed, sir."

Q. "When did He tell you so?" A. "I decline to discuss the matter with you."

Q. "Would it incriminate you if you were to answer the jury that question?" A. "I don't know whether it would or not."

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Q. "What is your theory of your defence?" A. "I have stated it very frequently. If you have not got comprehension enough to see it by this time, I won't attempt to enlighten you."

Q. "It is that you are legally insane, and not in fact insane, is it?" A. "The defence is, sir, that it was the Deity's act and not mine, and he will take care of it."

Q. "Are you insane at all?" A. "A great many people think I am very badly insane. My father thought I was. My relatives think I am badly cranked, and, always have thought I was off my base."

Q. "You told the jury you were not in fact insane?" A. "I am not an expert. Let the experts and the jury decide whether I am insane or not. That is what they are here for."

Q. "Do you believe you are insane?" A. "I decline to answer the question sir."

Q. "You did answer before that you were legally insane, did you not? Did you not so state in open Court?" A. "I decline to discuss that with you, sir. My opinion would not be of any value one way or the other. I am not an expert, and not a jurymen, and not the Court." See Willman's Art. of Cross-Examination, pp. 357—377.

**Proof of Insanity.**—Medical and legal standards of insanity are not identical. From the medical point of view, it is probably correct to say that every man

at the time of committing murder is insane and is not in sound, healthy and normal condition but from the legal point of view he is sane so long as he can distinguish between right or wrong or there is a guilty mind. 1923 L. 508 : 25 Cr. L. J. 395.

The mere presence of five circumstances, *viz.*, (1) absence of any motive, (2) absence of secrecy, (3) multiple murders, (4) want of prearrangement, and (5) want of accomplices does not fulfil the requirements of S. 84. A man may be suffering from insanity in the sense the word is used by an alienist but may not be suffering from unsoundness of mind as defined in S. 84. 8 L. 114 : 1927 L. 52. Existence of delusions which indicate a defect of sanity and uncontrollable impulse is not sufficient. 1929 C. 1 : 30 Cr. L. J. 494.

Accused made murderous assault on utter strangers and there was no motive. There was no accomplice and he tried to kill two more persons. The expert opinion was that he was suffering from Hebephrenia and was insane. Held, he was not guilty. 1935 O. 143. Modi's Medical Jurisprudence and Toxicology. (Ed. 4, 1932, p. 529 and the following). (Taylor's Principles and Practice of Medical Jurisprudence), (Ed. 8; Vol. I, 1928, p. 792). 45 A. 329, 1924 O. 190 : 24 Cr. L. J. 741, 1928 C. 238 : 30 Cr. L. J. 247, 1931 O. 77 : 32 Cr. L. J. 327, 1932 O. 190 : 137 I. C. 800 : 33 Cr. L. J. 542 Ref If a father kills children without motive, mental derangement should be inferred. 1933 N. 307 : 34 Cr. L. J. 1168. See 1931 O. 77. For other cases See Prem's Criminal Practice 1947.

**Expert Opinion on Insanity :—**The opinion of an expert on lunacy cannot be brushed aside upon the strength of the lay opinion of the trial Judge. 1935 O. 140.

The expert must establish that he has thorough knowledge about this subject and secondly that he has made a close study of the symptoms of the prisoner or defendant. Further he must give reasons for the opinion he holds about mental condition of person. The following illustration will show deplorable results ensuing on account of not following the above rules. *For illustration See Ch. 82 infra, and ill. (i) to Ch. 13 supra.*

## CHAPTER 50

### As to Motive.

No person speaks downright falsehood without a strong motive therefor. To conclude that the witness has committed perjury "you must suppose not only a weakness and wickedness of the heart, but an entire weakness of the head also," said Lord Brougham. 3 H. L. Cas. 132, 150.

Motive, according to Murray's Dictionary, is "that which moves or induces a person to act in a certain way, a desire, fear or other emotion, or a consideration of reason which influences or tends to influence a person's volition; it is also often applied to a contemplated result or object, the desire of which tends to influence volition." (Wills' Circumstantial Evidence, 6th Ed., p. 57.)

On this subject the following remarks of Wills may well be noted :—"As we cannot see into the mind of another, it follows that we must deduce the motive from the words, the looks, the conduct of the person in whom we are seeking for a motive. There may well be motives to commit crime which do not end in crime. They may be outweighed by other and conflicting motives, or by the moral sense. We can estimate by a knowledge of the existence and operation of motives in the average man what is probable in the mental economy of an average man, but such a course of deduction is a rough and ready process and liable to error in its application. Men are not all of average mental hue or constitution, and

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it does not follow that because there is something shown which would lead to crime in one man, or many men, that it would necessarily lead to crime in the case under consideration. Many a murder has been committed for the sake of very few pounds and yet there are hosts of people to whom millions would not offer the slightest inducement to anything of the kind, and we must be careful not to forget that when we have found a motive which might lead to crime, it by no means follows that we have found one which did lead to, as well as towards crime. Motive and intention are not the same. The distinction is important. A man's motive may be good, but his intention bad. A loaf was stolen by Jeanwaljean (the hero in *Les Misérables*). The intention was to steal, and the act therefore criminal, although the motive to save a starving child was good. If the motive be bad, it is difficult to conceive that the intention can be good. In a great many instances motive and intention are so closely related, motive being the parent of the intention, that it matters little of which we speak. But still it is desirable, never to forget that there is a difference, nor in what that difference consists.

"The common inducements to crime are the desire of revenging some real or fancied wrong, of getting rid of a rival or an obnoxious connection, of escaping from the pressure of pecuniary or other obligation or burden, of obtaining plunder or other coveted object, of preserving reputation, either that of general character or the conventional reputation of profession or sex, or of gratifying some other selfish, or malignant passion. It is always a satisfactory circumstance of corroboration when, in connection with convincing facts of conduct, an apparent motive can be assigned, but, as the operations of the mind are invisible and intangible, it is impossible to go further, and it must be remembered that there may be motives which no human being but the party himself can divine." (Wills' *Circumstantial Evidence*, 6th Ed., pp. 57, 60).

## Absence of Motive.

Absence of ascertainable motive comes to nothing, if the crime is proved to have been committed by a sane person. On the other hand, to eke out a weak case by proof of a motive apparently tending towards possible crime is a very unsatisfactory and dangerous process. Furthermore, suspicion, too readily excited by the appearance of supposed inducement, is incompatible with that even and unprejudiced state of mind which is indispensable to the formation of correct and sober judgment. While true it is that frequently "imputation and strong circumstances.....lead directly to the door of truth," it is equally true that entirely to penetrate the mind of man is out of human power, and that circumstances which apparently have presented powerful motives, may never have acted as such. Evidence of collateral facts which may appear to have presented a motive, for a particular action deserves *per se* no weight. With motives merely the legislator and the magistrate have nothing to do. *Actions as the objects or results of motives* are the only legitimately cognizable subjects of human laws. *Actus non facit reum nisi mens sit rea* is a maxim of reason and justice no less than of positive law. Motives and their objects differ, it has been remarked, as the springs and wheels of a watch differ from the pointing of the hour, being mutually related in the like manner. (3 Co. Inst. 107. For a discussion of the meaning and extent of this maxim, see *Reg v. Tolson*, 23 Q. B. D. 168. Hampden's *Lectures on Moral Philosophy*, Ed. 1835, pp. 213-214.)

It occasionally happens that actions of great enormity are committed for which no apparent motive is discoverable. It must not be concluded, however, that no pre-existent motive has operated, and upon principles of reason and justice essential to common security, the actor is held to be legally accountable for his actions, unless it be clearly and indubitably shown that he is bereft of reason and moral power.

On a trial for murder Lord Chief Justice Campbell thus summed up the doctrine of motive : " With respect to the alleged motive, it is of great importance to see whether there was a motive for committing such a crime, or whether there was not, or whether there is an improbability of its having been committed so strong as not to be overpowered by positive evidence. But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from the experience of Criminal Courts that atrocious crimes of this sort have been committed from very slight motives, not merely from malice and revenge, but to gain a small pecuniary advantage and to drive off for a time pressing difficulties."

Want of any proof of motive does not justify rejection of reliable evidence. 11 Cr. L. J. 498; 7 I. C. 601. The absence of all motive for a crime, when corroborated by independent evidence of the accused's previous insanity is not without weight. 34 C. 686. See 112 I. C. 222: 29 Cr. L. J. 1036.

Atrocious crimes have been committed from very slight motives, not merely from impulse or revenge but to gain a small pecuniary advantage and to drive off for a time pressing difficulties. Wills' Cir. Ev., 6th Ed. pp. 63-64.

### As Corroborating Evidence

The proof of a motive for crime is not corroboration of the evidence of an eye witness. 32 Cr. L. J. 97: 1931 O. 119. *Contra* 7 L. 84. Where there is other evidence of guilt of accused, the existence of motive is a circumstance corroborative of the case against him. 1926 L. 88: 7 L. 184.

## CHAPTER 51

### As to Pretended Blindness, Deafness, Epilepsy, Fainting Fits, etc.

Sometimes witnesses or criminals pretended to be ill, in order to gain time as to what statement to make. The usually happens when a difficult or incriminating question is put to a witness. It has often been observed that a witness when asked to read some entry in the account book, which goes against him, would always say that he has forgotten his spectacles at home. He would pretend to be unable to read. The cross-examiner should employ some clever trick to expose such sham blindness or simulation. Of course it may happen that a person under examination falls ill by chance or in consequence of great emotion and excitement, but in the majority of cases a sudden fainting fit an epileptic attack, or some other nervous seizure, is not genuine. The trick will be recognized when it is seen that the attack always occurs at a time favourable to the witness. Thus when the man is driven into a corner, when he does not find a ready answer, when he contradicts, when the Investigating Officer pulls him up sharp, that is the psychological moment. In such a case little can be done, for even if the trick be guessed, the sick man cannot be compelled to stop shamming: the scoundrel has effectively gained time and that is what he wanted. It follows that it is not a matter of indifference to the Investigating Officer whether he be shamming or not; on the one hand, he may be convinced that there is a screw loose somewhere, since simulation has been deemed necessary; on the other hand, he may induce the man to throw up the sponge, by showing him that nobody is taken in. The Investigating Officer will then, always and without exception, have recourse to the opinion of a medical man, and meantime will observe closely the phenomena accompanying the fainting fit, etc., he will make a note of his observation on a sheet of paper, so that he may communicate them as completely as possible to the medical man. If the phenomena have been accurately observed, the medical man may be able to give his opinion on the question of shamming with as great certainty as if he had himself seen the attack,



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This is the best thing to do, for it will seldom be possible to have the medical man to hand quickly enough to witness the seizure, while unusually the condition of the sick man improves with extraordinary rapidity on the arrival of the physician. If the latter declares the whole thing a pretence, the Investigating Officer can take a high hand if it occurs again, explaining to the person that his game is up, that it is extremely dangerous and adds greatly to the suspicion against him.

Some recommend the use of little stratagems or tricks, which they consider premissible. Thus, they say, it is a good thing to talk with the clerk, paying no attention to the individual twisting about in his attack, about matters which will be unpleasant for him to hear. Thus it may be said that he has already made a confession, or that one of his accomplices has given him away; the shammer, indignant at the lies he is hearing will suddenly begin to listen, will twist about less, especially if one talks in an under-tone. The story is told of a gipsy, suddenly fallen in an epileptic fit, who recovered at once when he heard the Magistrate say that it would be necessary to send the man to an hospital for the insane, where he would be compelled to sit on ice and be douched with cold water several hours a day. The gipsy was at once himself and promised to have no more epileptic fits. But such tricks cannot be countenanced, however useful they may prove in special circumstances; for in no case should the Investigating Officer descend to deliberate lying; while on the other hand, if he shammer is not taken in by the trick, the Investigating Officer is completely disarmed. One permissible device, which often succeeds quite as well when one is right in assuming simulation, is to say calmly and firmly that the whole thing is a sham and that the accused by his conduct is doing no good to himself. If the latter perceives that he is not believed, he will generally give up the game. But, as we have already said, the all important thing is to make sure that the attack is a *sham*; and as one cannot always have a medical man in attendance, as the attacks do not always last until a medical man can arrive, and as in so called chronic affections (as partial deafness) one cannot await the arrival of the medical man (for example on a journey), it is useful to know some methods of treating cases of no great complication.

Blindness may be simulated in many ways, some of the crudest description. Dr. Litton Forbes (*see Strand Magazine, March 1906*) mentions an ingenious device. He met a man in Paris who asked for charity on the score of blindness. The writer proceeds: "The man attracted my attention. He walked quickly and with air of confidence. He looked fixedly at me, and his eyes seemed to give expression to his thoughts. There was no uncertainty in his gaze, no shifty movements, no drooping or quivering of the lids. He told the story of his blindness from deep-seated inflammation in both eyes, which the doctors had pronounced incurable. He had at his command a rich vocabulary of technical terms, some of which misplaced absurdly. On closer looking into, the eyes did indeed present a curious appearance. In each the pupil had almost disappeared. The iris or coloured portion had absorbed the central black spot. The pupils had become mere pinholes, but what remained of them was bright and well-defined. A glance was enough for anyone familiar with eye affections. The man was an imposter. He had instilled a drug named eserine, the active principle of the Calabar bean, into each eye. This had contracted the pupils temporarily, without any permanent injury but the appearance produced was well calculated to lend weight to his other statements." It is added that he might with more effect have used atropine. This alkaloid is the active principle of *balladonna*, and has the effect of enormously dilating the pupils. In fact, the pupil may be made to absorb practically the whole of the coloured portion of the eye, and the black pupils then violently contrast with, and appear in relief against, the white portion

of the organ. A very strange and weird appearance, well-calculated to move the benevolent, is thus induced.

Dr. Forbes gives a useful test for detecting simulated blindness of one eye, a common form of deception among conscripts. "If a pencil, say, be held about two inches distant from the eyes, of a person with natural vision in both eyes, he will have no difficulty in spelling out each letter in every word of a line of small type. If, however, he tries to do the same with one eye closed, the pencil will effectually cover the pupil of the open eye and several consecutive letters will be lost to view. Hence, if the supposed one-eyed recruit can spell out the letters of each word with a pencil held in front of him, he has in truth performed an impossible feat, and the imposition at once stands revealed."

When deafness is feigned it is a very troublesome job for the Investigating Officer, especially when the inquiry is a hurried one which cannot be postponed, and there is neither time nor opportunity to call in a medical man. If we suspect the person to be shamming, it is important to let him see at once that we are not taken in. There are several ways of doing this which even an amateur can make use of.

Ave Lulleman recommends the employment of ushers or attenders to shout the questions in a loud voice into the ears of the deponent, until he gives up pretending. But this is very irregular procedure; besides it is not always easy to carry out, and, as a matter of fact, proves nothing, for such shouting is painful even to persons really hard of hearing.

A simple method is to strike the ground with the foot or let some heavy object fall behind the suspected individual. The man really hard of hearing perceives the disturbance, owing to the conductivity of the ground, the chair, his body; he "feels the noise" more or less; on the other hand, the pretender thinks he ought not to hear the noise; hence the former turns, the latter remains motionless.

If a person, as frequently happens, pretends to be deaf in one ear, the truth can be discovered with certainty by causing two persons simultaneously to whisper different words in the two ears. If one ear be quite deaf, the person can understand what is whispered in the other ear and can speak it. But if he can hear with both ears, what is whispered on the two sides becomes so confused that he understands nothing and can repeat nothing. Casper Liman however, remarks, and rightly, that the best means of detecting simulated deafness is to observe the features, though this plan serves rather to enlighten the Investigating Officer than to confuse the pretender. But if the Investigating Officer during the inquiry continuously watches the features of the person under examination and notes the impression produced by certain questions or remarks on the supposed deaf man, he will soon see, by a flash in the eyes or protesting motion of head, or hand, that he has been understood. If the Investigating Officer then quietly and firmly explains this, the "deaf" man will generally abandon his now useless attempt. The same observations apply to deaf-mutes, for deaf-mutes are only persons deaf from birth, who have consequently never learned to talk. If then mutism is feigned, deafness must be feigned also; for it is very rare that one becomes mute after birth, and such cases are still more rarely simulated. It must also be remembered that according to the observations of Liman, Naschka, and Toscan, deaf-mutes hear almost all the noises produced by solid bodies, stamping of feet on the ground, fall of heavy articles, etc., they therefore turn round, while the pretender remains unmoved. A method which frequently succeeds has been suggested by Klaussmann Weien, namely to cause the deaf person to write something. One really deaf, who has been taught to write in an

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institution for deaf-mutes, will write correctly and without orthographical faults, while the pretender writes by sound and hence often incorrectly.

Epilepsy is simulated not only before a magistrate to avoid an interrogatory or a conviction, but before the military authorities to escape from service. Such simulations belong for the most part to the domain of the Medical Jurisprudence; but it is frequently important for the Investigating Officer to be able to decide at once whether an attack of epilepsy be real or feigned; for example, when about to arrest a person upon a warrant or, as just indicated, when a suspect desires to interrupt an embarrassing examination. If the Investigating Officer discovers the trick at the first glance he will, of course, proceed very differently from how he would act if in doubt. Besides, we may have to wait a long time for the medical report; for shamners are generally very careful not to have a fit in presence of the medical man. Even if the latter be summoned speedily, our man will cut his short fit so that no complete diagnosis of it can be made. As a rule, feigned attacks are good imitation and consequently difficult to detect. The reason doubtless is that no one feigns an epileptic seizure without having often seen one. Unfortunately this terrible malady is so widespread that opportunities for observing it are only too frequent. Much has been written upon the easiest methods of detecting feigned epilepsy; all treatises on Medical Jurisprudence deal with the question; and army surgeons have also published many hand-books treating of this and other feigned disabilities for military service (as Dr. W. Derblich, E. Heller, etc.,) each one has characteristic symptoms on which he relies, deprecating those of his colleagues so that on the whole little really reliable remains. We can, however, say:— 1. An attack is always suspicious when it comes at a critical moment favourable to the individual attacked, at the moment of arrest, during an examination, etc. If must not, of course, be forgotten that extreme emotion, great fright, etc., may bring on a nervous attack in the case of persons really ill. 2. The manner of the fall is important. The individual whose attack is genuine, does not select the spot of his fall, nor does he take any precautions or guard himself with his hands; thus he is often severely wounded, especially on the face, as he falls forward. The shammer sinks down gently, protecting himself in his fall by stretching out his hands or opening his elbows. Even if he does not act thus and should by chance hurt himself, he cannot completely repress some manifestation of pain, as a contraction of the features, etc. 3. The "startling but very characteristic" cry of the epileptic, so well-known and, once heard, so impossible to forget, this unique cry, proceeding from the throat and accompanied by foaming at the mouth "*rauque plutôt qu'aigu*," as the French Doctors say, "hoarse rather than shrill," will afford satisfactory proof only in certain cases. If the sick man repeats the cry frequently or continues it for some time, he is certainly pretending; but if he cries out only once, then the attack is genuine or the imitation perfect; if the cry be absent, the attack may yet be genuine, for it is often wanting in the case of well-known and genuine cases. 4. An important symptom, and one impossible to feign, is the muscular contraction, those convulsive movements and peculiar tremblings of the muscles in the region of the back and the nape of the neck: what might be called "muscular anarchy," or confusion. Some very strong men, especially expert gymnasts, can produce this contraction in the upper part of the arm, but no one can at will provoke it over the whole body; in the true epileptic this phenomenon occurs spontaneously. The individual who feigns, throws his limbs about on all sides, shakes, trembles, struggles, but the play of the muscles is wanting. 5. Perhaps the most important symptom is the colour of the face which in the true epileptic first becomes extraordinarily pale and then changes to bluish violet. The person feigning can never produce this paleness artificially, although many men can produce the lividity as often as they wish.

When a person under examination is seized with an attack of epilepsy true or false, it is above all necessary not to lose one's head ; for, as just stated, fright and emotion may produce a genuine seizure; such fits therefore do occur from time to time and in the case of the young Investigating Officer unaccustomed to such shocking sights, deprive him of all presence of mind and prevent calm observation. What he usually does in his otherwise excusable excitement, is to run crying for help looting for water throwing himself about so that when the medical man questions him as to what he has observed, he is incapable of furnishing any information. If a case of epilepsy does occur, the Investigating Officer must see man, deal with it as genuine, affording the sick man such help as is usual in such cases. Care must be taken that the patient does not injure himself, by removing from his vicinity all angular objects, he must be allowed fresh air and and his tight-fitting clothes must be loosened ; attempt must be made to introduce between the teeth some elastic body, a folded linen pad, wool, India-rubber, so that he may not bite his tongue, taking care that this gag does not slip into his mouth and choke him. Nothing else can be done ; have patience and look out for signs of shamming ; send at once for the medical man to succour the genuinely afflicted or unmask the hypocrite. But this must be remembered that nearly every true epileptic lies, is violent and bigoted." See Aiyer's Art of Cross-examination. pp. 727—732.

## CHAPTER 52

### As to Relationship of Witness

Near relationship between a witness and the party for whom he testifies is an influence which, common experiment teaches us, tends to bias consciously or unconsciously the testimony of witnesses. 176 (N. Y.) 150, 159 : 68 N. E. Rep. 148, 151. A sister of a party no doubt would have a strong interest in favour of her brother. 8 Knapp. 122, 125. The difference between a direct pecuniary interest in the witness and the interest of love and affection growing out of the closest family ties between the witness and the party pecuniarily interested, while theoretically wide, is not in the majority of cases of real importance. (Va 1896) 24 S. E. Re. 241, 243. Husbands and wives testifying on behalf of each other, especially in criminal cases, would be unnatural and unworthy if they did not feel a very strong bias in favour of their consorts. 15 Minch. 403, 414. Just as in the case of pecuniary and other interest, so in case of relationship, that alone is not a sufficient ground for imputting perjury. 97 Mo. 51, 53 Atl. Rep. 879.

Relationship to the party calling a witness is not a sufficient reason by itself for disbelieving a witness. 1923 N. 322 : 76 I. C. 722, 1923 L. 593, 1934 L. 153, 1933 O. 340., 1940 L. 58, 1942 O. 193, 1939 p. 292, 1946 P. 84, 1947 A. 67. The test is whether evidence has the ring of truth. 1947 L. 73. The evidence of respectable persons with special means of knowledge owing to relationship to the parties should not be viewed with suspicion in cases where only oral evidence is ordinarily available. 25 I. C. 60, 32 I. C. 380. If the evidence of friends and relations is not considered as independent and reliable, then the Court shall have to fall back either on the evidence of enemies or total strangers, who would have no business to be present at the time when offence is committed. 1931 L. 38 : 32. Cr. L. J. 522. Where the eye witnesses are related to the deceased and there is no reason for their deposing falsely, they should be believed. 1935 L. 94 (95) : 1935 Cr. C. 92. Where the eye witnesses belong to the family of the deceased, some corroboration is necessary, especially where valuable property comes back to the family of the complainants. 1935 L. 130 : The mere fact that witnesses are relatives and interested is no ground to disbelieve them if a point can only be established by their testimony. 32 I. C. 380. Where witness's brother

brought a complaint against the accused's cousin one year back, the witness is not an interested one. 1925 L. 318 : If P. W's are close relations, and support the defence version, their testimony may be ignored. 1915 L. 43.

## CHAPTER 53

### As to Privileged Matters or Communications

*Relating to Affairs of State.* S. 123, Evidence Act, says : " No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit."

Court is not entitled to inspect a document which relates to affairs of state, with a view to decide an objection to its production under S. 123, Evidence Act, S. 162, Evidence Act.

The head of the department, in whose custody a document is, is the exclusive judge whether that document is, or is not, protected from production on the ground of state policy. If he claims such protection, Court will not go behind the claim. 1930 M. 342, 1925 O. 540, 48 C. 304. An officer's refusal to produce a document on the ground of public policy is final. 47 I. C. 225. Where the state itself is a litigating party, the Court has the power to inquire into the nature of the document for which protection is sought under S. 123, and to require some indication of this nature of injury to the state which would follow its production. 1931 P. C. 254 : 135 I. C. 625 (P. C.).

A report of inquiry against jail officials is protected. 89 I. C. 387. Police diaries are privileged documents. 1933 L. 498 : 142 I. C. 854. Statements before Income-tax Officers and orders under S. 14 or S. 23 of the Income Tax Act are not privileged. 32 M. 62. Neither Original, nor certified copies of Income-tax returns or assessment can be produced under S. 51, Income Tax Act, but proper secondary evidence is admissible. 56 B. 324 ; 1932 B. 291. Statements by witnesses in a departmental inquiry are not privileged. 16 C. W. N. 431 : 15 I. C. 77, *but see* 40 C. 898. Privilege cannot be claimed with regard to documents which have been already published. 1931 P. C. 254 : 135 I. C. 625. Where letter addressed by the head of department reaches addressee, it ceases to be unpublished document within the meaning of S. 123 and Court can order its production under S. 162. 1933 L. 157. As unpublished official records are protected from disclosure, therefore secondary evidence of their contents is inadmissible. 59 C. 1046, 27 B. 189. A complaint or action founded or privileged document must fail as secondary evidence cannot be produced. 5. I. C. 714, 27, B. 189. Secondary evidence of Income-tax return or assessment is admissible, though under S. 54, Income Tax Act, original or certified copy cannot be produced. 56 B. 324. There is no adverse inference from refusal to give evidence derived from unpublished official documents relating to affairs of state. 40 C. 898, *but see* S. 114, *ill. (b)*, Evidence Act, and 59 C. 1046. Departmental enquiry papers are not unpublished documents relating to affairs of state. 1936 N. 25 : 161 I. C. 668 : 40 C. 898, *fol.* All documents must be produced. Ordinarily it is not sufficient if head of department certifies that they relate to affairs of State. If the Court finds them to be state documents, they cannot be admitted in evidence unless the head of the department permits their production. 1933 N. 358, *see* 1939 B. 287. *Ipsé dixit* of head of Department that the document relates to affairs of state is conclusive. 1945 L. 459, 1944 L. 209, 1944 L. 434, 1943 C. 539, 1942 A. C. 624. Govt. Official should state that the document cannot be produced without injury to public interest. 1946 N. 256.

*Communication Made to Counsel*.—S. 126, Evidence Act, lays down: "No barrister, attorney, pleader or *vakil* shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or *vakil*, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

Provided that nothing in this section shall protect from disclosure—(1) any such communication made in furtherance of any illegal purpose; (2) any fact observed by any barrister, pleader, attorney or *vakil*, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, pleader, attorney or *vakil* was or was not directed to such fact by or on behalf of his client.

*Explanation*.—The obligation stated in this section continues after the employment has ceased.

The privilege extends only to the barristers attorneys, *Vakils*, and pleaders. A *Mukhtar* is a pleader as defined in S. 4 (1) (r) of Cr. P. C. and S. 126, Evidence Act, applies to him. 25 C. 736 : 1933 C. 5 : 143 I. C. 682.

To be protected from disclosure the communication must have been made in the course and for the purpose of professional employment. A communication made before the relationship of legal adviser and client came into existence or after it ceased is not privileged. 58 C. 1879 : 1932 C. 143. The obligation to keep undisclosed professional communications has nothing to do with the question whether at the time they were made there was any pending litigation or any prospect of it. 1925 B. 1. : 84 I. C. 353. Letters containing instructions or confidential communications to the lawyer with reference to the conduct of the suit are protected from disclosure. 12 C. 265 : 18 B. 263. For other cases *See* Prem's Criminal Practice 1947.

*Communication Made in Official Confidence*.—S. 124, Evidence Act, lays down: "No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure."

The object of S. 124 is to prevent disclosure to the detriment of public interest. Privilege cannot, therefore, be claimed in respect of a communication, merely on the ground that its disclosure would cause a scandal in the office. 39 M. 304. The privilege does not depend on the use of the word "confidential." 39 M. 304. A Government resolution including the opinions of Government Officers and Legal Remembrancer is a privileged document. 1926 B. 590 : 89 I. C. 293. A statement by a person setting forth the financial position of his estate to the Collector with a view to his taking the estate under the Court of Wards is a communication made in official confidence. 44 A. 360 : 1922 A 37. A letter written by a private person to the Post Master General complaining of the conduct of a postal official is not privileged. *Monir's Ev.*, 1st Edn. p. 900. A return submitted to an Income-tax Collector, any statement made before him, or any order made by him are not privileged under Ss. 123 and 124, Evidence Act, 32 M. 62, *see* 26 C. 281. The question whether the document is communication made to the public officer in official confidence is for the Court to decide, 44 A. 360 : 32 M. 62, *see* 1929 O. 543 : 123 I. C. 222, and the Court under S. 162, Evidence Act, can inspect a document to find out if it is a communication made in official confidence unless it relates to any affair of state. 32 M. 62. When the Court decides that the document is a communication made in official con-

fidence, it has no authority to compel the public officer to produce it, inasmuch as the public officer himself is the sole judge of whether its disclosure would or would not be in the public interest. 1929 O. 543 : 122 I. C. 222, 1922 A. 37 : 44 A. 360, 39 M. 304, 32 M. 62, 7 C. W. N. 246.

Communications made in official confidence cannot be proved by secondary evidence 27 B. 189, 5 I. C. 714.

Where a document is privileged, no adverse inference can be drawn from its non-production. 40 C. 898, *but see* S. 114, Ill. (h), Ev. Act. Where no privilege is claimed with regard to a document under S. 124 in the Lower Court, it cannot be claimed in appeal. 1928 M. 332 : 72 I. C. 214, 1928 M. 1093 : 118 I. C. 872.

*Communication During Marriage.*—S. 122, Evidence Act, says : “No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.”

Communications between husband and wife are protected from disclosure. The prohibition enacted by S. 122, Ev. Act, rests on no technicality that can be waived and the Court is not entitled to relax it. 40 C. 891. Even if the witness is willing to disclose an incriminating statement it will be inadmissible. 1923 L. 40, 10 P. R. 1914. In civil cases where a relevant statement made to the witness by the witness's husband or wife is sought to be proved it is not admissible without the consent of the witness's husband or wife, or of the representative-in-interest of such husband or wife, as all communications are privileged. 1930 L. 280 : 120 I. C. 294. If the husband or wife of the witness has left no representative-in-interest, the communication becomes entirely inadmissible. A widow herself is not the representative-in-interest of her husband. 40 C. 891. There can be no privilege when the marriage is void. Woodroffe Evidence, 9th Ed., p. 930.

*Of Judge as a Witness.*—S. 121, Evidence Act, says : “No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate ; but he may be examined as to other matters which occurred in his presence whilst he was so acting.”

Judges and Magistrates are competent witnesses but they are not compellable to answer any question as to their conduct in Court as such Judges or Magistrates. 3 A. 573. A Judge cannot be asked whether he took down deposition improperly, or what were the terms of the deposition. S. 121, Ill. (a) (b). He may be called upon to speak to any foreign and collateral matter which happened in his presence while the trial was pending, or after it was ended. Taylor, S. 938. Best, S. 181. A Judge or Magistrate can waive the privilege and then it does not lie in the mouth of any other person to assert the privilege. 3 A. 573 (F. B.).

*As to Information Regarding Commission of Offence.*—S. 125, Evidence Act, says, “No Magistrate or police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.”

*Waiver of Privilege.*—S. 128, Evidence Act, says : If any party to a suit gives evidence therein at his own instance or otherwise he shall not be deemed to



have consented thereby to such disclosure as is mentioned in S. 123 ; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or *wakil* as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or *wakil* on matters which, but for such question, he would not be at liberty to disclose."

S. 129, Evidence Act, says : " No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others."

The privilege being the client's, he is at liberty to waive it expressly. *See* S. 126, Ev. Act. Privilege is not waived merely by the client's giving evidence in the cause at his own instance or otherwise, or by his calling the legal adviser as a witness. *See* S. 128, Ev. Act. Failure on the part of the client to claim privilege when he is under cross-examination, does not amount to express consent given by him to his legal adviser to disclose communication which is otherwise privileged. 1933 S. 47 : 148 I. C. 345. But when the client gives evidence at his own instance or when he calls his legal adviser as his witness and questions him on a privileged communication, the privilege is waived. S. 129, Ev. Act.

## CHAPTER 54

### As to Speed of Motor Car or Train

In cases of injuries to persons on account of the negligence of motor drivers and railway companies, the speed of the car or the railway train is a crucial point, and is very difficult to be established. There are always a number of motor cars on the move and using the roads. Nobody is anxious to notice the speed of any particular car, unless it exceeds all possible limits and the attention of a witness is particularly drawn to it. Generally it is found that after an accident has occurred, people make surmises regarding the speed of the car. When it was coming from opposite direction, the witness cannot judge the speed by looking at the front portion of the car. "As a matter of evidence, it is frequently of consequence to know the speed with which a person was riding or driving at a particular time. Accidents are every day occurring from fast riding or driving; a child is run over; a carriage is overturned. In these cases, few spectators, perhaps, will be able to say with any accuracy the rate of speed at which the person who caused the accident was going. To do this satisfactorily requires a former attention to speed, with a view to determine the rate of it: and from that attention and experience, grown into a habit, to settle a rate of speed on any particular occasion. Thus De Quincey says in his essay on the English Mail Coach: I could not but observe with alarm the quickened motion of our horses. Ten years' experience had made my eye learned in the valuing of motion; and I saw that we were now running thirteen miles an hour." *See* Ram on Facts, pp. 74—77.

The speed of individuals varies very largely, according to time, place and circumstances. Dr. Henry, speaking of the Britons, Gauls, and Germans, tells us on the authority of Cæsar and Tacitus: "It was a common practice among all these nations, to mix an equal number of their swiftest footmen with their cavalry; each footmen holding a horse's mane, and keeping pace with him in all his motion." And he adds: "This way of fighting continued so long among the genuine posterity of the Caledonians, that it was practised by the Highlanders in the Scots army in the Civil War of the last (seventeenth) century."



Neither Cæsar nor Tacitus mentions the swiftness or the size of the horses, important points in judging of the activity and speed of the men. The annals of the "Sporting World" doubtless furnish remarkable instances of man's swiftness of foot; but, as a fact in common evidence, it is not the extraordinary feat of a pedestrian that requires attention, but the ordinary pace of a man in walking or running, and especially the ability of the individual whose speed on a particular occasion it may be important to know. *Ibid.*

Speed is greatly governed by the nature of the ground passed over; being accelerated or retarded by the evenness or roughness of it, and by its form of plain or hill. So obstructions of any kind in the way, whether constant or casual, may hinder, and on the other hand, freedom from them may assist the rate of speed. The greatest impulse to speed is given by the motive for it. If the word goes forth—"Escape for thy life; look not behind thee"—the utmost attainable swiftness may be expected as the result. When the malefactor, thief or murderer meditates an alibi and escaping from the scene of his crime thinks, if he says not, "Would I were safe at home in bed!" no strain on his muscular power is spared to mend and keep up his pace. *Ibid.*, p. 75.

Sir Walter Scott says: "When a Scottish chieftain designed to summon his clan upon any sudden or important emergency, he slew a goat, and making a cross of any light wood, seared its extremities in the fire, and extinguished them in the blood of the animal. This was called the Fiery Cross or the Cross of Shame, because disobedience to what the symbol implied inferred infamy. It was delivered to a swift and trusty messenger, who ran full speed with it to the next hamlet, where he presented it to the principal person with a single word, implying the place of rendezvous. He, who received the symbol was bound to send it forward, with equal dispatch, to the next village and thus it passed with incredible celerity, through all the districts, which owed allegiance to the chief and also among his allies and neighbours, if the danger was common to them. At sight of the Fiery Cross, every man, from sixteen years old to sixty capable of bearing arms, was obliged instantly to repair in his best arms and accoutrements to the place of rendezvous. He, who failed to appear suffered the extremities of fire and sword which were emblematically announced to the disobedient by the bloody and burnt marks upon this warlike signal. During the Civil War of 1745-1746, the Fiery Cross often made its circuit; and upon one occasion it passed through the whole district of Breadalbane, a tract of thirty-two miles, in three hours. See Ram on Facts, p. 75.

### Illustrations

(i) This was a case of ordinary negligence on the street cars or other vehicles of that description. "Now, as a rule, in that case, the facts are particularly undisputed, but the issue turns upon one particular circumstance, usually the rate of speed, and I am taking that just as an example. The men concerned with the car movement swear that the car was going at 6 miles an hour. The man who hasn't understand the street railway system in Toronto, or, at any rate, who doesn't had very much experience perhaps in cross-examination, will press the witness to increase the speed to 10 or 12, and by the time the examination is through, the witness has put it down to 5, thus showing the danger of cross-examination. That is a fact which I have seen on more than one occasion. Now see how near the evidence is to the facts and what the cross-examiner should do with it. Take the collaterals. You take the trip the car had to make in the time allotted for the purpose; you take what the motor-man, or whoever he might be, was doing at the particular moment; you test him on his observation and his chance of observation—his opportunity. You show that perhaps he had no cause to note the speed until after the accident had happened,

not before. Then, there is always the question of the fear of dismissal, which would be important. Now, these facts are impressions, if I may call them facts; that is, the collaterals are impressions; it is the duty and the business of the cross-examiner to ascertain them from his witnesses, leaving the question of speed to the witness himself." 20 M. L. J. 282.

(ii) See illustration in Ch. 24 *supra*.

## CHAPTER 55

### As to Suppression of Documents or Things

In a number of cases, certain documents are withheld by a party, because they do not support his case or rather go against him. O. 13, r. 2, C. P. C., debars production of certain documents at a later stage.

O. 13, R. 2 lays down: "No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing."

The object of the provisions contained in O. 13, R. 2 is to prevent fraud by the late production of suspicious documents. But where there is no suspicion about the genuineness of the documents, the Court can receive them at a later stage. 1928 P. 555 : 7 P. 589, 1928 P. 209, 1926 C. 1, 45 C. 878 (P.C.), 1929 P. 324, 1928 R. 196. No documents, whether public or private, which are above suspicion should be excluded on the ground of late production. 1929 P. C. 99 : 56 C. 1003, 1924 P. 517, 1926 M. 347, 1930 P. 603. O. 13, r. 2, should be deliberately construed so as to advance the cause of justice. 1926 M. 347, 1924 P. 517, 1924 P. 208, 33 C. 1345.

The Court can receive, even at a late stage, public documents or certified copies, 1928 M. 516 : 51 M. 472, decrees of Court, 1924 C. 1059, books filed in another Court previously, 45 C. 878 (P. C.), registered documents, 1927 P. 117, or official records of undoubted authority. 1929 P. C. 99 : 56 C. 1003. Unregistered documents, 1926 M. 347, or private documents, 1930 P. 603, or documents on unstamped plain paper, 1864 W.R. 271, should be received at late stage if they are above suspicion. Documents were filed with the plaint but tendered only on the close of the plaintiff's case, it was held, that they should not be rejected. 33 C. 1345. Documents can be received at rehearing on review, even if not tendered at the first trial. 1928 C. 416. For other cases See Prem's Laws of India 1840-1940.

### Presumption from Non-Production of Material Documents.

Illustration (g) to S. 114, Evidence Act lays down that the Court may presume that the evidence which could be and is not produced, would be unfavourable to the person who withholds it.

If a party does not produce a material document, the oral evidence of its contents becomes inadmissible 1928 P. 111 : 68 I. C. 653, 7 A. 738, Ss. 64, 65 & 91, Ev. Act, and the presumption under S. 114 (g), Ev. Act, that evidence which could be and is not produced, would, if produced, be unfavourable to him, will arise. 1931 M. 451 : 144 I. C. 27, 70 I. C. 278 : 1923 O. 59, 43 C. 707 : 1916 P. C. 256 (P. C.), 34 M. 257 (P. C.) : 7 A. 738, 62 I. C. 697. Where a person claiming a right of way refuses to put in the conveyance in his favour presumption under S. 114 (g), Ev. Act, will arise against him. 15 A. 270. Where a tenant pleads permanency of tenure but does not produce settlement papers, the inference is against him. 1923 P. 111 : 68 I. C. 653. In a suit for enhancement of rent where collection papers are withheld by the tenants, the presumption will be against them, 30 C. 1033 (P. C.).

## CROSS-EXAMINATION

The non-production of document raises the presumption that it contains some defeasance, *i.e.*, there was some endorsement on a document which the plaintiff did not like. 49 A. 78 : 1926 G. 741, 1930 M. W. N. 417. The rule that the Court may draw on adverse inference against a party refusing to produce a document is applicable where the loss of the document is alleged by the party but not proved. 7 A. 738, 1930 M. W. N. 417. No adverse presumption can be drawn against a party where the document withheld is a privileged document. 4 C. 898. No adverse presumption arises where the document is irrelevant or does not form party's case. 1935 C. 39 : 61 C. 711, 154 I. C. 48, 37 A. 557 (P. C.). In a suit based on a bond or a mortgage it is not permissible to the Court to draw an adverse inference from the plaintiff's failure to produce his account book, unless established upon by the other party. 1928 N. 119 : 106 I. C. 305. Unless it is suppressed, a Court is not entitled to presume that the contents of the documents if produced would have been unfavourable. 1928 A. 441, 71 I. C. 654, 1 P. 715, 1934 P. C. 84 : 57 M. 443, 1933 P. C. 87 : 142 I. C. 220. The Court may refuse to raise presumption in the case of ancient documents. 1923 A. 441 : 71 I. C. 654. The presumption will not arise if there is sufficient explanation for the non-production of a document. 61 C. 711 : 1935 C. 39.

The presumption from the non-production of evidence is that, if produced, it would either establish the opposite party's case or be otherwise prejudicial to his own case. 1929 P. C. 95 : 114 I. C. 592, 50 C. 276 : 1923 C. 233, 40 M. 402 (P. C.), 42 M. 629.

**Production by Strangers** :—A witness who is not a party to a suit, *i.e.*, a stranger shall not be compelled to produce his title-deeds or any documents of the nature of title-deeds, *e.g.*, documents of pledge or mortgage, or any document the production of which might tend to criminate him unless he has agreed in writing to produce them (S. 130, Evi. Act). No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production (S. 131, Evi. Act).

If a person on cross-examination refuses to produce a material document or material object, do not press him further. Thus Wills in his great work on "Circumstantial Evidence says" :—"The suppression or destruction of pertinent evidence is always a prejudicial circumstance of great weight, for it naturally leads to the inference that, such evidence, if it were produced, would operate unfavourably to the party in whose power it is to produce it, and who withholds it or has wilfully and without good reason deprived himself of the power of producing it."

## Illustrations

(i) "A chimney-sweeper having found a jewel, took it to a jeweller to ascertain its value, who, having removed it from the socket, gave him three-half pence, and refused to return it. The friends of the finder encouraged him to bring an action against the jeweller, and Lord Chief Justice Pratt directed the jury, that unless the defendant produced the jewel, and showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewel the measure of their damages."

"In an action of trover for a diamond necklace which had been unlawfully taken out the owner's possession, it appeared that some of the diamonds were seen shortly afterwards in the defendant's possession, and that he could give no satisfactory account how he came by them; the jury were directed to presume that the whole set of the diamonds had come to the defendant's hands, and that the full value of the whole was the proper measure of damages."

"On an ejectment suit involving the title to a large estate in Ireland, the question being whether the plaintiff was the legitimate son of Lord Altham,

and therefore prior in right to the defendant, who was his brother, it was proved that the defendant had procured the plaintiff, when a boy, to be kidnapped and sent to America, and, on his return, fifteen years afterwards, on an occasion of an accidental homicide, had assisted in an unjust prosecution against him for murder. It was held that these circumstances raised a violent presumption of the defendant's knowledge of title in the plaintiff, and jury were directed that the suppressor and the destroyer were to be considered in the same light as the law considered a spoliator as having destroyed the proper evidence, that against him, defective proof, so far as he had occasioned such defect, must be received, and everything presumed to make it effectual, and that if they thought the plaintiff had been given probable evidence of his being the legitimate son of Lord Altham, the proof might be turned on the defendant and that they might expect satisfaction from him that his brother died without issue.

(ii) A suit was brought to recover the insurance on a large warehouse full of goods that had been burnt to the ground. The insurance companies had been unable to find any stock-book that would show the amount of goods in stock at the time of the fire. One of the witnesses to the fire happened to be the plaintiff's book-keeper, who, in his examination-in-chief testified to all the details of the fire but said nothing about the books. The cross-examination was confined to these few pointed questions :—

Q. "I suppose you had an iron safe in your office, in which you kept your books of account ? A. "Yes, Sir."

Q. "Did that burn up ? A. "Oh, No."

Q. "Were you present when it was opened after the fire ? A. "Yes."

Q. Then won't you be good enough to hand me the stock-book that we may show the jury exactly what stock you had on hand at the time of the fire on which you claim loss ?

(This was the point of the case and the jury were not prepared for the answer which followed): A. "I haven't it, Sir."

Q. "What haven't, the stock-book ?" "You don't mean you have lost it ?"

A. "It was'n't in the safe, Sir."

Q. "How was it that the book wasn't there ?" A. "It had evidently been left out the night before the fire by mistake."

The jury at once inferred that the books were suppressed.

## CHAPTER 56

### As to Time

#### (A) *As to Length of Time*

Length of time is often very important in evidence as a measure by which to judge of the possibility or probability of doing something, said to have been accomplished. It is often important to measure a transaction by time, and to see whether one of such magnitude or containing so many things, could be accomplished within it. Cic. De. Invent. I. 26. When a person speaks to the length of time which was consumed in doing something, whether by the speaker, or some one else, it may happen that the time was known, and is remembered, by having at the time looked at a watch, or heard a clock strike. Ram on Facts, pp. 70—74. Where length of time is founded on probability only, there is necessarily some uncertainty about the exact length. For what in one person's mind might be an hour, might, in another's be half an hour or an hour and a half. And it is, besides, well-known that few persons have a just notion of the length of a small space of time. Ram on Facts, pp. 71-72. Great mental trouble or anxiety may make past time to appear much longer than it really was. Pepys enters in his diary, (Wednesday, 5th September, 1666), in the midst of the fire of London, which began on Sunday morning the 2nd: "It is a strange

thing to see how long this time did look since Sunday, having been always full of variety of actions and little sleep, that it looked like a week or more, and I had forgot almost the day of the week." Ram on Facts, p. 73. In India where references of time are generally approximate, there is a large margin of honest error. 19 I. C. 828; 15 Bombay Law Reporter 297.

So if from any cause length of time is, purposely to know it, marked from beginning to end; to ascertain for instance, how long a person is speaking, or his passing from one place to another by walking, running, or riding, in such cases, the length of time is impressed on the mind, and is therefore commonly and easily remembered. But where there is not a particular object in marking length of time, it commonly happens that a person who himself does anything, or observes another doing it, does not, in the progress of the act or work, nor at its completion, note the length of time so employed. In such a case, the time while passing on, or when completed, does not leave any impression, and consequently cannot be in the memory, or be remembered. In a case of this kind if a person undertakes to speak to the length of time, what he says will not be from memory; it may be from argument in his own mind that the thing done did probably take the length of time he speaks to:—Thus, "*Hamlet asks*,—'Staye'd it long?'"

*Horatio answers*,—"While one with moderate haste might tell a hundred," See Ram on Facts.

"It has been truly observed," said Chief Baron Macdonald on an important trial, "that there is nothing we are so little in the habit of measuring, with any degree of correctness, as small portions of time. I am persuaded, that if any one were to examine with a watch, which marks the seconds, how much longer a space of time a few seconds, or a few minutes, really are, than people in general conceive them to be, they would be surprised; but, in general, when we speak of a minute, two minutes, or an instant, we can hardly be understood to mean more, than that it was a very short space of time." Trial of Pach., p. 171. Sir Augustus Frazer in a letter written by him on the 22nd of June, 1815, after the battle of Waterloo which was on the 18th, says:—"How misery prolongs time! It already seems an age since we were at Brussels; the very day of the 18th seems an age ago." Letters of Sir A. Frazer, p. 565.

#### (B) As to Time of Death

(i) *From digestion of Food*:—The state of digestion of the contents of the stomach is often used as a means of fixing the hour of death. Taylor's Med. Jur., 1928, Vol. I, p. 294. Most elaborate tables have been prepared of the time taken by the stomach to digest certain articles of diet, of which the following may be taken as an example:—

Article.	Time for digestion. H. M.	Article.	Time for digestion. H. M.
Rice	... 1 0	Eggs, half boiled	... 3 0
Apples, cooked	... 1 30	Beef	... 3 0
Venison	... 1 30	Carrots, boiled	... 3 15
Sago	... 1 45	Potatoes	... 3 30
Bread	... 2 0	Turnips	... 3 30
Milk	... 2 0	Butter and cheese	... 3 30
Cabbage	... 2 0	Oysters, stewed	... 3 30
Oysters, raw	... 2 3	Eggs, stewed	... 3 30
Eggs, raw	... 2 3	Pork, boiled	... 3 30
Potatoes, roast	... 2 30	Fowls	... 4 0
Parsnips, cooked	... 2 30	Wild fowl	... 4 30
Turkey	... 2 30	Beef salt	... 5 30
Goose	... 2 30	Pork roast	... 5 30
Custard, baked	... 2 45	Veal	... 5 30
Mutton	... 3 0		— <i>Ibid.</i>

The table must not be taken as of mathematical certainty, but may represent fair averages. The rate of digestion varies with different individuals and with the state of the gastric mucosa. Death does not at once cause the process of digestion to stop, as we know that the stomach can even digest itself after death. With all this uncertainty, too much stress must not be placed on such evidence; it must be weighed along with all other items, *Ibid*, p. 295. Periods given above do not refer to the digestion of Indian foods in Indian stomachs, on which but few observations or experiments have been recorded. The natives of India use either rice, wheat, or other grains as their staple food. In addition to this many use some of the pulses, and comparatively few eat meat, fowl or fish. The experiments and observations seem to show that some portion of a meal of rice, pulses, etc., may be found undigested even six or seven hours after the taking of food. Taylor's Med. Jur., 1923, pp. 917-918. Too much stress must not be placed on such evidence. It must be weighed along with all other evidence. *Ibid*. Too much stress should not be laid on the condition of food in deceased's body in order to find out the time of occurrence, as the recent medical researches have shown that sometimes the process of digestion is greatly delayed in case of Indians, when the food is vegetable food. 31 Cr. L. J. 689; 1930 O. 60: 129 I. C. 444. Presence of indigested food in the stomach of the deceased indicates that he must have been murdered within 3 or 4 hours 43 Cr. L. J. 8 (10) Rice takes one hour to digest but if Dhatura is administered, process of digestion is retarded by another hour. 49 A. 57.

(ii) *From warmth and condition of muscles*:—The changes which take place in dead body before commencement of putrefaction, may sometimes enable a medical witness to form an opinion of the time at which the deceased died. The crime may have been so recently perpetrated, that the body still retains the warmth and pliancy observed in the recently dead, or it may be found in a cold and rigid state. A person charged with a crime may be able to prove that he had not been in the house for many hours or days or evidence may be adduced to show that he was there at a time which would correspond to the condition of the body when found. Taylor's Med. Jur., 1928, pp. 288-289.

A woman was found dead at 8 A. M. Her body was lying on a wooden floor covered with a flannel petticoat and a chemise. The upper limbs were cold and rigid; the face, shoulders and chest were cold, the neck was rigidly fixed with the trunk, the thighs and legs were quite cold, but there was no rigidity in these parts. The only warmth found in the body was in the lower part of abdomen. The correct opinion was that the deceased had been dead above four hours, certainly more than three and not less. *Ibid*, p. 291.

Unless we have due regard to all the circumstances of a case, grave errors may be committed. The circumstances are cold atmosphere, thinness of body, thinness of covering, age of the deceased, loss of blood, etc. The retention of warmth by the abdominal viscera may be met with after fifteen to twenty hours. In one case the temperature of the viscera of the abdomen, more than seventeen hours after death, was found to be 76°F., although no care had been taken to preserve the warmth of the body. Taylor's Med. Jur., 1928, pp. 293-294.

(iii) *From putrefaction*:—Putrefaction means the destruction of nitrogen-containing substances, brought about by the influence of microbes, with the production of foul-smelling gaseous products. Taylor's Med. Jur., 1923, Vol. I, p. 243.

*Temperature of the air.* (a) The process is found to go on most rapidly in a temperature varying from 70° to 100° F. (b) It will commence, other circumstances concurring, at any temperature above 50° F., but it appears to be wholly arrested at 32° F. (c) The dead body may thus be preserved for a considerable time in snow, ice, or in frozen soil; but if after removal it is exposed to

a temperature between 70° and 100° F., the ordinary putrefactive changes are stated to take place with more than their usual rapidity. (d) At a high temperature, again, *i. e.*, about 212° F. putrefaction is arrested. (e) The effect of temperature is strikingly seen in the influence of season. A dead body exposed to air during summer when the thermometer is above 60° or 70° F., may show more putrefactive changes in twenty-four hours than a similar body exposed for a week or ten days in winter. Taylor's Med. Jur. 1928, Vol. I, p. 252. (f) Putrefaction in open air is generally accomplished in a month. Ryan's Med. Jur. 1836, p. 500.

*Influence of moisture.* (a) Unless the animal substance is at least damp, putrefaction cannot take place. (b) The animal solids, however, commonly contain sufficient water for the establishment of the process. In human body weighing 150 lbs, there are about 100 lbs. of water. (c) The soft organs differ much from each other in regard to the quantity of liquid contained in them, and therefore in the degree in which they are prone to putrefaction. Thus the brain and the eye are in this respect contrasted with the teeth, bones, hair, and nails. The fluids of the eye are rapidly decomposed while the teeth and hair may remain for centuries unchanged. (d) If the organic substance is dried, putrefaction is arrested. Taylor's Med. Jur., Vol. I, p. 253.

*Influence of Access of Air.* (a) Air, apart from its temperature, influences decomposition according to whether it is dry or moist, at rest or in motion. Dry air thus retards decomposition by dessicating the tissues exposed to it, and if the dry air be in motion, the effect is still more marked. (b) When bodies are hermetically sealed in lead coffins, such anaerobic microbes either do not gain access to the corpse, or soon cease their action, for such corpses are often found very little decomposed even after long periods. Taylor's Med. Jur., 1928, Vol. I, pp. 254-255.

*Influence of light.* As microbes work better in the dark, it is possible that light may have some influence by some of its constituent rays, or rather by some rays associated with ordinary sunlight. Taylor's Med. Jur., 1928, Vol. I, p. 255.

*Influence of the state of the body.* (a) Fat and flabby bodies are observed to undergo putrefaction more readily than those which are thin and emaciated, probably because they retain heat better and the tissues are more moist. (b) Those parts which at the time of death are affected by wounds or bruising rapidly pass into a state of putrefaction, due to the more ready entry of organisms into the lacerated part. (c) Children are said to decompose more readily than adults, but the bodies of newly born infants who have not been fed resist putrefaction for long periods. (d) The bodies of chronic alcoholics and undoubtedly have a tendency to rapid putrefaction, though alcohol, *in vitro*, has slight antiseptic power. Taylor's Med. Jur., 1928, Vol. I, p. 255; Ryan's Med. Jur., 1836, p. 503.

*Influence of the Cause of Death.* (a) The bodies of persons who have died from acute diseases have been observed to putrefy more readily than those of persons who have died from wasting and chronic disease. (b) It has been also remarked that the bodies of plethoric persons who have died suddenly while in good health have undergone rapid decomposition. (c) In persons who have died from asphyxia, as by drowning, suffocation, or strangulations, the bodies are observed to putrefy with great rapidity; and, as a general rule, all those parts of the body which at the time of death are irritated, congested, or inflamed, are rapidly attacked by the putrefactive process. (d) In death from prussic acid, morphine, and other vegetable poisons, putrefaction generally commences early, and progresses with rapidity, while strychnine has been supposed to exercise a



retarding power. (e) Some poisons, by chemically combining with animal matter appear to confer on it the power of resisting putrefaction at least to a very great degree. This is now a well-known property of arsenic, and this poison is largely employed as an antiseptic. When a solution of it is injected into the arteries of a dead body, it tends to preserve it for a long time from putrefaction. (f) Chloride of zinc, a powerful irritant poison, is another well-known preservative. It retards putrefaction apparently by combining with the tissues. Taylor's Med. Jur., 1928, Vol. I, pp. 255-256-257.

*Influence of chemical substance.* (a) Unslaked lime, if placed on the body and freshly slaked, will develop a considerable amount of heat. This heat is insufficient to cause destruction, but on the contrary, it has a tendency to delay putrefaction and to preserve the body. (b) Slaked lime and chlorinated lime have also been used in an attempt to destroy tissues, but they act as antiseptic substances and thus inhibit the growth of micro-organisms and delay destruction of the body. Taylor's Med. Jur., 1928, Vol. I, pp. 255-256-257.

*Influence of burial in earth.* (a) Unless the body has been buried in metal, or converted into adipocere, it is not probable that any of the soft parts will be found, in a soil favourable for decomposition, after ten or twelve years, Taylor's Med. Jur., 1928, Vol. I, p. 260. (b) If the ground is elevated or on an acclivity, it will commonly be dry and decomposition will be retarded, if a body is buried in a low situation, or in a valley, the soil being generally damp, decomposition will be hastened. (c) A dry and absorbent soil retards putrefaction; and thus bodies buried in the sands of Egypt become often perfectly dessicated, and resist the process for a long series of years. (d) In sand, gravel, or chalks, putrefaction goes on more slowly than in other soils, (e) In marl or clay, if air has access, the process takes place more quickly. *Ibid*, p. 261, (f) The deeper the grave the longer putrefaction is retarded. *Ibid* p. 262, (g) Bodies buried in shallow graves are subject to the fluctuations of temperature which take place during the day and night, and throughout the seasons of the year; they are, therefore, most favourably placed for the rapid progress of putrefaction. (h) According to the most accurate observations, the diurnal changes of temperature extend to about two or less feet in depth below the surface, while the seasonal changes are perceptible to the depth of six feet. Bodies buried below this depth putrefy slowly, owing to the uniform and comparatively low temperature which is maintained there. *Ibid*. (i) Putrefaction is more rapid in bodies buried naked than in those which have been buried wrapped in clothes. *Ibid* p. 262. (j) The process is less rapid when the body is interred in close coffin; and when the latter is formed of an imperishable material such as lead closely sealed, putrefaction is speedily arrested; and the deceased may be recognised after the lapse of many years. *Ibid*, p. 262, Ryan's Med. Jur., 1886, p. 506.

(a) The researches on drowning made by Casper and Kanzler show that, while the lower part of the body may be in a tolerably fresh condition, the face, beard, neck, and upper part of the chest may present a reddish colour passing into patches of a bluish green, first seen on the temples, ears, and nape of the neck, thence spreading to the face and afterwards to the throat and chest. These changes may be observed in summer when a body has remained in water from eight to twelve days, and in winter for a longer period. Taylor's Med. Jur., 1928, Vol. I, p. 264. (b) The head of a drowned person is sometimes much discoloured from putrefaction when the rest of the body is in its ordinary condition. (c) Decomposition undoubtedly takes place more slowly than in the atmosphere, owing to the low temperature and to the fact that the free access of air is cut off. *Ibid*, p. 215. (d) Putrefaction in water is not, in general, completed sooner than six weeks. It is more rapid in running than in stagnant water. Ryan's Med. Jur., 1886, p. 501.



Putrefaction in the open air is generally accomplished in a month. The conversion of the colouration of the skin into green, commences within first four or five days after death; the epiderm is detached in two days afterwards; the green tint now becomes brown. Air which is very dry and hot, desiccates and mummifies the body, whilst warm and humid air very much hastens its decomposition. Young infants resist putrefaction in the open air much longer than adults Ryan's Med. Jur., 1836, p. 500.

(iv) *From Rigor mortis.* *Rigor mortis* generally commences within three to six hours of death, while the body is cooling, but long before it has reached the temperature of the surrounding. It comes on slowly in healthy, muscular subjects who have died without convulsions, *e. g.*, by haemorrhage, hanging, etc. It sets in rapidly in new born infants. All circumstances which cause an exhaustion of muscles, during life induce an early occurrence of rigidity, as is seen in hunted animals, overdriven cattle and in cases of poisoning by strychnia and other convulsant poisons. Taylor's Med. Jur., pp. 232-233. The sooner the rigidity sets in the more quickly it disappears and gives way to putrefactive processes. Generally, *rigor mortis* lasts for from sixteen to twenty-four hours in sound, muscular subjects. It may last much longer, from 24 to 36 hours and exceptionally it may continue for fourteen days or even longer. Taylor's Med. Jur., 1928, p. 234. Atmospheric changes have influence over it. Dry cold air will cause it to persist for a long time; and thus in winter season, especially in frost, it is slow in disappearing—its mean duration being from twenty-four to thirty-six hours. If the air is warm and saturated with humidity, it soon ceases. In the tropics where the temperature ranges between 80° and 100° F., rigor usually begins to disappear in twenty to twenty four hours. *Ibid*, p. 235. Bodies sunk in cold water soon pass into this state and retain the rigidity for a long time. *Ibid*. Bodies of those who are emaciated or die of Phthisis, Typhus or typhoid fever, and epidemic cholera, pass rapidly into a state of rigidity, which is commonly of short duration. *Rigor mortis* is frequently absent in the bodies of those who have died from generalized septicæmia. The old opinion of the non-occurrence of rigidity in the bodies of persons killed by lightning is unfounded. *Ibid*, p. 236. Rigidity produced as a result of poisoning by strychnine may continue for a very long period. As to other poisons, such as arsenic, mercury perchloride, etc., are likely to cause delay in putrefaction and hence a prolonged state of stiffness in muscles. *Ibid*. p. 237.

(C) *As to Time of Occurrence.* When there is no clear finding as to time of occurrence and the prosecution evidence is vague, the accused should be acquitted 1922 p. 88. If the family of deceased deliberately put the attack back some two hours before it actually occurred, the case becomes doubtful. 1930 O. 60: 31 Cr. L. J. 689. Too much stress should not be laid upon the condition of food in deceased's body in order to find out the time of occurrence, as the recent medical researches have shown that sometimes the process of digestion is greatly delayed in the case of Indians when the food is vegetable food. 31 Cr. L. J. 689: 1930 O. 60: 124 I. C. 444.

## CHAPTER 57

### By Judge or Jury

S. 165, Evidence Act, provides that: "The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he please, in any form, at any time of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-

examine any witness upon any answer given in reply to any such question :

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved : Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party ; nor shall that Judge ask any question which it would be improper for any other person to ask under section 148 or 149 ; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

S. 166 of the Evidence Act says: "In cases tried by jury or with assessors, the jury or assessors, may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper."

S. 165 which invests the Judge with plenary powers to put any question to any witness or party, in any form, at any time, about any fact relevant or irrelevant, is in accordance with the English and American practice. (See Wharton, S. 281). S. 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that, in order to get the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever. (See Stephen's Introduction, p. 162). The power of asking questions is of obvious utility in a country like India, where in the vast majority of cases no advocate is employed, and the Judge has to make out the truth as best he can from the confused, inaccurate, and often intentionally false accounts of ignorant, excited and mendacious witnesses. In England, cases are fully prepared for trial before they come into Court, so that the Judge has nothing to do but to sit still and weigh the evidence produced before him. In India, in an enormous mass of cases this neither is nor can be so. It is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand: (See Stephen's Speech in Council.)

S. 165 unables the Judge to obtain what writers on evidence describe as "indicative" evidence, and which has been defined by Best as "evidence not itself receivable but which is indicative of better." Bentham in one place calls such evidence "evidence of evidence." If a witness offers to relate something told him by A, it will be inadmissible being hearsay ; but such hearsay may be valuable as indicating a genuine source of testimony. In such a case, A may be called to give direct evidence as to the fact. See Best, S. 93. As the power to ask questions is given to secure indicative evidence, a Judge is not, under the provisions of this section, entitled to put questions to a witness with a view to taking criminal proceedings against him. 10 B. 185.

Section 165 does not affect any rule of relevancy or of mode of proof ; Proviso (1).—It must not, however, be supposed that the Legislature by giving to the Judge such wide powers of questioning a witness on facts "relevant or irrelevant" intended to throw to the winds all those rules of relevancy and of mode of proof so elaborately defined and illustrated in the earlier part of the Act. On the other hand, this section expressly provides that, though the Judge may question a witness on irrelevant matters, his findings must be based "upon facts declared by this Act to be relevant and duly proved." It has been mentioned already that neither an omission by a party to object to the reception of irrelevant evidence, nor consent of parties to the reception of such evidence, can make it relevant ; and a Judge is equally precluded from making his

## CROSS-EXAMINATION

ground of decision a fact which is not declared by the Act to be relevant or which is expressly declared to be irrelevant. Thus, it is not open to a Court, in contravention of the provisions of section 162 of the Criminal Procedure Code, to question a witness as to a statement made by him to the police, with a view to discredit him; or to disbelieve a witness by comparing his contradictory statement to the police with his statement to Court, where the former was neither put to the witness by the defence in cross-examination, nor proved. As a general rule, the Judge should not interfere with the cross-examiner when the witness is in his hands. He should allow the cross-examiner to question the witness according as he wishes to do but the Court has the duty to bring all the evidence on records and to see that justice is done. 43 A. 233. When the Judge takes up cross-examining a witness himself and if you see the Judge that he is in the least inclined towards you, it is much better that he should do it himself. In such a case the counsel should not be particular to cross-examine himself, because the Judge will do it more effectively for him. *See Wrotteley, Examination of Witnesses*, page 91.

Similarly if a Juror wants to question any witness, the counsel should not be particular about it. "Never continue the cross-examination of a witness if you see the Judge showed the slightest disposition to do it himself. If you see the Judge, to use somewhat sporting expression, in the least inclined to take up the running, let him do it. He would do it much better, much more effectively than counsel could do it, because there is not one of Her Majesty's Judges sitting on the Bench who, if he chose, could not mar the best cross-examination that could be administered. A witness cannot be cross-examined without the approval of the Bench. With the approval of the Bench one can do pretty much what one liked. "Sir James Scarlett used to allow the Jurors and even the Judges to discover for themselves the best parts of his case. It flattered their vanity. Scarlett went upon the theory, he tells us in the fragments of autobiography which were completed before his death, that whatever strikes the mind of a Juror as the result of his own observation and discovery makes always the strongest impression upon him, and the Juror holds on to his own discovery with the greatest tenacity and possibly to the exclusion of every other fact in the case. *Wellmen*, p. 157.

The case law may be summarised as follows:—Judge's power to put questions to a witness is limited under S. 165. 57 M. 635, 1934 M. 199, 10 B. 185, 1927 R. 74, 70 I. C. 278. The section enables the Judge to obtain evidence not in itself receivable, but which is indicative of better. 57 M. 635: 1934 M. 199. It is not proper for the Court to examine witnesses unless pleaders on either sides have omitted to put some material questions. 6 C. 279. Power given under this section is to be exercised to clear up obscurities, to fill up lacunæ to supplement deficiencies and generally to elicit truth. 47 C. 1043, 5 L. 476. The Court has no power to order the production of a document which is not relevant and the production of which is not ordered to obtain proof of a relevant fact. 57 M. 635: 1934 M. 199. It is not open to a Court to disregard the provisions of S. 162, Cr. P. C., and question a witness regarding statement made to Police, with a view to discredit him. 1932 M. W. N. 625, 58 C. 1009, 1926 C. 147. Judge is precluded from making his ground of decision on evidence which is not relevant. 56 I. C. 807. Court cannot base his judgement on the documents made by Police and signed by witnesses unless duly proved. 1927 L. 79. A Magistrate told a witness "Recollect, or else I will send you into custody." Held, he acted improperly. 8 A. 672. Parties are not, as of right, entitled to cross-examine a witness on the answer made to Court questions. 11 Bom. H.C. 166, 29 C. 387. For other cases *See Ch. 26 Supra*.

### Limitation on the Power of Judge.

There are some limitations on the power of the Judge for cross-examining the witnesses, *e. g.*, a witness cannot be questioned as to matters protected from disclosure in order that the Court can put question to discredit a witness which if put by a party would not be allowed under Section 148 or 149, Evidence Act. See Section 165 (Proviso.)

Sections 121 to 129 define the matters which a witness cannot be compelled or permitted to disclose, whether those matters are reduced to writing or not; and the present section forbids the Court from itself questioning a witness as to these matters. Questions tending to impeach the credit of a witness by injuring his character cannot be asked as of right, and the Court has a discretion in allowing or disallowing a particular question asked with that object. See S. 118, Ev. Act. The discretion is not, however, arbitrary, and the principles governing its exercise are laid down in Section 148. By the Proviso to Section 165, a Judge is forbidden to ask a question to impeach the credit of a witness by injuring his character, which, if asked by a party, would not, according to the rules laid down in Section 148, be allowed by him. Since the Court must forbid any question which appears to it to be intended to insult or annoy, or which appears to it to be needlessly offensive in form, the Court itself should not ask any such question. Thus, where a Magistrate addressing a witness said to him "Recollect, or else I will send you into custody", it was held that the Magistrate acted improperly. 8 A. 672. Judge cannot under S 165 Ev. Act introduce evidence in contravention of S. 162 Cr. P. C. 1931 C. 189=82 Cr. L. J. 841.

### Right of Parties to Cross-Examine after Court Questions.

S. 165 provides that where a witness is examined and cross-examined by the parties and is then questioned by the Court, neither party has the right to cross-examine the witness on the matters stated by him in answer to Court questions, though the Court may, in its discretion, allow such cross-examination. When, after the examination of a witness by the complainant and the defendant, the Court takes him in hand, he is put under special pressure, as the Judge empowered to put any question he pleases, in any form, about any fact, relevant or irrelevant; and he is, therefore, at the same time, placed under the special protection of the Court, which may, at its discretion, allow a party to cross-examine him, but this cannot be asked for as a matter of right. The principle applies equally, whether it is intended to direct the examination to the witness's statements of facts, or to circumstances touching his credibility. 11 B. II. C. 166. In England neither party is entitled as of right to cross-examine a witness called by the Court and not by a party, and this has been suggested in an Oudh case to be the rule in India also. 1924 O. 182. In several other decisions, however, it has been held that Section 165 of the Evidence Act, in denying the right of cross-examination to the parties, contemplates only those cases where the Court questions a witness after he has been examined and cross-examined by the parties. 11 B. H. C. 166. Where a witness is called by a party, but the party calling him declines to examine him, and thereupon the Court examines the witness, the position of the witness is that of a Court witness, and both parties are entitled to cross-examine him. See 29 C. 387, 1923 C. 463. See *Ca. 80 infra*.

That Court has the power to recall a witness already examined and cross-examined, and it seems that neither party can, as of right, claim to cross-examine him on the matters elicited in answer to Court questions. See S. 540, Cr. P. C. and O. XVIII, r. 17, C. P. C.

It is a well known axiom of the play wright that in a mystery drama it is always better to let the audience discover for themselves the fellow who had

"done" the deed. Similarly if a Judge or a Juror takes up a particular point and gets interested, it is the duty of the Counsel to allow him to continue, to pursue it without any interruption. A Juror clings tenaciously to what he thinks is his own discovery, often to the exclusion of other facts in the case. To illustrate: In the famous trial of Bruno Hauptmann, the prosecutor cross examined the accused regarding the ransome money. The prosecution theory was that the accused had cashed the bills at different places in order to avoid creating suspicion. The defence was that the accused did not know the source of money which had been left with him in a box by his friend Isadorfisch. The following cross-examination took place.

Q. You live on 22nd street but you bought vegetables down at 89th street?  
A. It was cheaper.

Q. How far was Jacobson's shoe store from your home? A. Seven or eight miles.

Q. You gave them a twenty dollar gold certificate? A. Yes.

Q. How many shoe stores were there nearer to your home? A. Oh, plenty of shoe stores.

No explanation was demanded from the witness. The jury drew the inference from the questions put to him that the accused had avoided the stores in his own locality and had spread the ransome money about, because he was aware of its source.

## CHAPTER 58

### By Oneself When called as a Witness by the Opponent

Sometimes a party is called by the opposite party as his witness. The question arises whether such party has a right to cross-examine himself when the other party conducts his examination-in-chief.

"It is one of the artifices of a weak and somewhat paltry kind of advocacy, for each litigant to cause his opponent to the summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity for cross-examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought never to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation, as it has done in this instance." 31 A. 116 P. C.; (1913), M. W. N, 826 In 32 All. 104 P. C. Lord Atkinson condemned it as a "vicious practice unworthy of a high-toned or reputable system of advocacy." It was held in, 46 C. L. J. 272 P. C.—"It sometimes takes the form of a manoeuvre under which the counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's own witness. This is thought to be clever, but it is a bad and degrading practice." It has been held in a recent case that where a witness stands in a situation which naturally makes himself adverse to the party desiring his testimony, the party calling the witness is not as of right entitled to cross-examine him, the matter being solely in the discretion of the Court under S. 154 to permit the person calling the witness to put any question to him which might be put in cross-examination by the adverse party, 49 C. 93, when a litigant is called as a witness by the opposite party, the latter is not entitled as a matter of right to cross-examine him as a hostile witness; but it is a matter in the discretion of the Judge. 42 Ch. D. 372 A. C.

Where a plaintiff closes his case without calling the defendant as a witness and the defendant does not appear as a witness to support his own case, the

plaintiff will not be allowed after the close of the defendant's case to call the defendant unless there has been some misleading representation by the other side that the defendant would be examined in support of his own case. (Allen v. Allen, 1894, P. 248).

If a party appears as a witness on behalf of the opposite party, the Court should, before proceeding to record his statement, question him or his counsel as to whether he does not propose to appear as his own witness. If that party then declares that he does not propose to appear as his own witness, the Court should point out to the party producing him that, ordinarily speaking, the matter should be left as it is and the Court be left to draw any adverse inference which may justifiably be drawn from the refusal of the party to appear in the witness-box and subject himself to cross-examination. If the party, however, insists on examining the opposite party as his own witness, the Court should be careful not to allow him to cross-examine his own witness, because unless the witness is declared hostile, the party producing the witness has no right to cross-examine his own witness. See 1934 L. 126.

Where a party whose evidence is material does not go into the witness-box and give evidence, the presumption is that he has abstained from giving evidence by reason of the fact that the truth is on the opposite side; and the Court is entitled to infer everything against him. 1934 L. 398, 1922 B. 81. The presumption against a party from his failure to go into the witness-box arises only if he deliberately abstains from giving evidence in regard to transactions to which he was a party, and which are otherwise proved to have taken place, so that he is imperatively called upon for an explanation; and where such is not the case, no adverse presumption can be drawn against him. 154 P. L. R. 1916. A party need not call his opponent as his witness, in fact it is objectionable to do so. 1929 L. 868, 1934 L. 126, as by so doing he runs a risk of making the statement of his opponent, part of his own evidence. 1926 M. 384 : 92 I. C. 844, 1934 L. 126. It is most unsatisfactory to examine the principal defendant as witness in the case before the plaintiff's case has been opened or the evidence of his witness given. 1923 P. C. 73 I. C. 391, 116 P. W. R. 1908.

## CHAPTER 59

### Impeaching Credit of Witness

#### *Abuse of Cross-Examination as to Credit*

There is a tendency on the part of some counsels to abuse the privilege of cross-examination as to credit. *Taylor says* :—“ It, however, seems clear that where the transaction, as to which the witness is interrogated, forms any material part of the issue, he will be obliged to give evidence, however strongly it may reflect on his own conduct. Indeed it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, where the testimony is required either for the due administration of public justice, or to protect the property, the reputation, the liberty, or the life of a fellow subject. Where, however, the question is not directly material to the issue but is only put for the purpose of testing the character, and consequent credit of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show, that in such a case, the witness is not bound to answer, but this privilege, if it still exists, is certainly much discountenanced in the practice of modern times. No doubt cases may arise, where the Judge in the exercise of his discretion, would properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries to discreditable transactions of a remote date might,

in general, be rightly suppressed ; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance, at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But no protection of this sort should be extended to cases where the enquiry relates to transactions comparatively recent, bearing directly on the moral principles of the witness and his present character for veracity. In such cases as these, a person ought not to be privileged from answering, notwithstanding the answer may disgrace him." (Taylor, Ss. 1459—1462).

Lord Chief Justice Cockburn, expressed himself thus on the subject :— "I deeply deplore that members of the Bar so frequently, unnecessarily put questions affecting the private life of witnesses, which are only justifiable when they challenge the credibility of a witness. I have watched closely the administration of justice in France, Germany, Holland, Belgium, Italy, and a little in Spain, as well as in the United States, in Canada, and in Ireland, and in no place have I seen witnesses so badgered, brow-beaten, and in every way so brutally maltreated as in England. The way in which we treat our witnesses is a national disgrace, and a serious obstacle instead of aiding the ends of justice. In England the most honourable and conscientious men loathe the witness-box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying misnamed cross-examination in our English Courts. Watch the tremor that passes the frames of many persons as they enter the witness-box. I remember to have seen so distinguished a man as Sir Benjamin Brodie shiver as he entered the witness-box. I daresay his apprehension amounted to exquisite torture. Witnesses are just as necessary for the administration of justice as judges or jurymen and are entitled to be treated with the same consideration, and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the judges or jurymen. I venture to think that it is the duty of a Judge to allow no questions to be put to a witness, unless such are clearly pertinent to the issue before the Court, except where the credibility of the witness is deliberately challenged by counsel and that the credibility of a witness should not be wantonly challenged on slight grounds." (*Irish Law Times*, 1874, quoted in Wellman, p. 178).

There are occasions when the credit of a witness should be vigorously attacked by showing that from his antecedents, associations and character, he is not a man whose testimony can be relied upon. Recent incidents throwing light on the moral principles of a witness affecting his veracity must, of course, be brought out however unpleasant they may be. But the privilege should not be abused by succumbing to the temptation of making indiscriminate attacks on each and every witness. There may be materials in the advocate's possession for making personal attacks on the character of a witness, but the question is whether throwing mud would serve any useful purpose other than outrage to the feelings of a man. Errors of conduct in the past or long-forgotten improprieties should not be raked up, merely because the client insists on humiliating his adversary. The propriety or impropriety of the questions is to be judged by the standard laid down in S. 148, I. E. A. The advocate should reflect—(i) Whether the truth of the imputation conveyed would *seriously affect* the opinion of the Court as to the trustworthiness of the witness *on the matter to which he testifies*. Thus it would be preposterous to ask a woman who was an unfortunate and accidental spectator of an affray in the street, whether she was a prostitute or demi-rep. But in a case of rape, the prosecutrix may be cross-examined as to her acts of immorality not only with the accused but with other persons (S. 155); (ii) Whether the imputation conveyed relates to improprieties or errors of conduct



or other discreditable transactions of so remote a date, or of such a character that it would, if at all, affect in a *slight degree* the Court's opinion as to the witness's veracity *on the matter to which he testifies*. Thus, "if a woman" said Sir James Stephen "prosecuted a man for picking her pocket, it would be monstrous to enquire where she had illegitimate child ten years before, although circumstances might exist which render such enquiry necessary" (Steph. Genl. View of Cr. Law); (iii) Whether there is a *great disproportion* between the importance of the imputation conveyed and the importance of the witness's evidence. Thus, if a medical man is called to depose about the injuries of a person attended to by him or about an autopsy held by him, it is a character which would be preposterous if he was asked questions regarding his private life and character which do not concern any other man. Sir James Stephen, said: "I shall not believe, unless and until it is decided upon solemn agreement, that by the law of England a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction in his past life, however private, inquired into by persons who may wish to serve the basest purpose of fraud or revenge by doing so. Suppose for instance, a medical man were to prove the fact that slight wound had been inflicted and had been attended to by him; would it be lawful under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs extending over many years and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved. If this is the law, it should be altered." (Steph. Digest, pp. 196-197).

Sir Frank Lockwood in the course of an address in March 1893 said: "According to the public press there were a lot of swashbucklers going about the world disguised as lawyers, who endeavoured to get their living by the injury of reputations, by cruel attacks upon credit. Those whom he was addressing knew perfectly well that any man who so betrayed a professional trust that was placed within his hands was not only a knave, but a fool. Whoever had been in the habit of going into a Court of Justice, knew perfectly well that cruel and irrelevant cross-examination was disastrous to the cause whose advocates administered it. He believed that if cross-examination was improper, or irrelevant, or cruel, it brought its punishment at once, and he was certain that the cause was lost that was endeavoured to be bolstered up by it. No one knew better than the distinguished advocates he saw around him when to stop a cross-examination. The hint came from the jury-box before much mischief was done and the advocate was a bad one who did not take the hint." (Quoted in Wrottesley, p. 91)

"Counsel may have in his possession material for injuring the witness, but the propriety of using it often becomes a serious question even in cases where its use is otherwise legitimate. An outrage to the feelings of a witness may be quickly resented by a jury, and sympathy take the place of disgust. Then, too, one has to reckon with the Judge, and the indignation of a strong Judge is not wisely provoked. Nothing could be more unprofessional than for counsel to ask questions which disgrace not only the witness, but a host of innocent persons, for the mere reason that the client wishes them to be asked." (Wellman, p. 168).

When there is an appropriate occasion for attacking the character of a witness by reference to his past character and misdeeds, an advocate cannot shrink from the task, disagreeable though it may be to many. The feelings of a dishonest witness cannot be placed above the interests of the parties in a case and justice. "Lord Bramwell in an article in the *Nineteenth Century* for February, 1892, strongly defended Sir Charles Russel and his imitators who were severely criticised as "forensic bullies" and complained of as lending the authority of their example to the abuse of cross-examination to credit." "A judge's sentence



for crime, however much repented of, is not the only punishment; there is the consequent loss of character in addition, which should confront such a person whenever called to the witness stand." Women who carry on illicit intercourse, and whose husbands die of poison, must not complain at having the veil that ordinarily screens a woman's life from public inquiry rudely torn aside." "It is well for the sake of truth that there should be wholesome dread of cross-examination." "It should not be understood to be a trivial matter, but rather looked upon as a trying ordeal." "None but the sore feel the probe." Such were some of the many arguments of the various upholders of broad licence in examinations to credit." (Wellman, p. 172).

There are some complaints about witnesses being maltreated and disgraced by imputations against their character. Cockburn, C. J. said that "in England the most honourable and conscientious men loathe the witness-box." An unjustifiable attack on the character of witnesses at the mere direction of a party who is often actuated by spite, is calculated to scare away honest men from the witness-box. It is a common sight to see witnesses being insulted and annoyed by offensive questions which have no possible bearing on the points in issue or on their veracity. Questions regarding family life, private affairs, long forgotten improprieties of conduct are asked with no ostensible reason but to disgrace them personally. The public view with alarm the abuse of the privilege. From the point of view of the interests of the client also, it does more harm than good. Very often after an unsuccessful attempt to get answers in his favour or to shake the testimony of a witness, he is abused and unfounded imputations are made on his character. This outrage on his feelings naturally provokes the witness to make statements against the cross-examiner's client which he would not have said under ordinary circumstances. How can the advocate expect to advance his client's cause, if he deliberately insults a respectable witness or makes a personal attack? The inevitable result is that the Judge and the Jury feel sympathy for the unfortunate witness and exactly the opposite result is produced. It should be remembered that however sinister the suggestion might be, the cross-examiner is bound by the answer of the witness. If a denial is given, it must be accepted and no evidence can be tendered to contradict the witness (see S. 153, I. Evidence Act). So, unless the attack is justified, the repudiation by witness would raise the presumption that his statement is true. At the same time there may be cases when a man of notorious character who pretends to put on the veil of virtue and wilfully perverts the truth, should be mercilessly exposed. Such a man ought not to be allowed to leave the witness-box without being found out. But although an advocate may have in his possession materials for staining the character of a witness, there must be a proper occasion for it. The particular circumstances of the case ought to justify the attack.

If lawyers will not desist from abusing the privilege, it would be the duty of the Court to interfere and stop such attacks. Section 148 of the Evidence Act lays down the principles which determine when such questions are proper or improper. It is often not easy for the Judge to determine beforehand whether the question are really justified. Questions which may appear at first sight to be useless may, at another stage, be found to be pertinent. The discretion must, therefore, rest in the first instance with the advocate and the Judge is naturally unwilling to interfere. His respect for the profession, instincts of gentlemanliness and requirements of the case ought to dictate whether the questions are proper or improper. If, however, the confidence is abused, and personal invectives are indulged in with the sole object of satisfying the grudge of the client, the Judge must interfere. Making grave and scandalous charges against Judges or the opposite party on the mere wishes of clients is misconduct. Pleaders are not puppets in the hands of the man who pays them (21 A. L. J. 898). See Sarkar's Modern Advocacy, pp. 181-182.

"Judges and Juries are quick to resent unwarranted attacks upon the character of witnesses or parties upon cross-examination, and, in estimating the damages to a plaintiff, they will usually give him damages not only for the original wrong which he has suffered at the hands of the defendant, but they will also give him damages for any injury which may have been done to his character by a virulent cross-examination, or a malignant attack upon him made by counsel in his address to the jury." Wrottesley on Examination of Witnesses, p. 90. If the character of the adverse witness is vulnerable, it may be advisable to adopt a severe and searching style of cross-examination, but it must be borne in mind that assaults upon a witness's character are always dangerous, and tend to create a certain sympathy in the minds of the occupants of the Jury-box. 14 Cr. L. J. p. 19. Justice Manisty said :—"I have always set my face against turning the witness-box into a pillory, and I always shall do so as long as I sit on the Bench. Witnesses come to give evidence, mostly against their will, and if they are to have their whole lives laid bare by cross-examination, and every unhappy failing or misfortune of their early days raked up for the purpose of throwing discredit, as it is called, upon their testimony, it is a form of torture that no one will voluntarily submit to, and the cause of justice will suffer. No one will come forward to give evidence, for no one will be safe. Few persons could stand an examination into the whole of the incidents and errors of their past lives. Witnesses should be protected in their performances of a public duty, and matters which do not directly affect their credibility should not be dragged forth to the public gaze. I repeat it : you have no right to turn the witness-box into a pillory." Harris' Illustrations in Advocacy, p. 60. "It is dangerous to cross-examine as to character unless the Advocate asking the question has good ground for making his attack upon the witness." Hardwick's Art of Winning Cases, p. 200. "If a thief makes imputation against the wife or other female relation of the complainant maliciously and the allegation is found to be false, it is a good ground for giving him a severe or deterrent sentence." See 13 P. L. R. 1913.

"The number of witnesses, and their concurrence in support of a given assertion, is also subject of material importance in deciding upon the credit of their testimony, because of the improbability of two witnesses concurring in the same falsehood or mistake of either of them individually ; and the improbability increases in proportion with the number. But in the contrasting of contradictory testimony, mere consideration of number is held subordinate to that of the indications of individual veracity, and the maxim that *ponderantur, non numerantur testes*, is of very frequent practical application. Other circumstances being equal, the preponderance of numbers is certainly entitled to the advantage, and sometimes this preponderance will be sufficiently great to counterbalance an apparent superiority in other circumstances on the opposite side ; and although nothing can be more remote from the subject under discussion than the application of the strict rules of mathematical equality or proportion, a fair attention to the principles of those rules is often of considerable importance. The degree of influence or indifference of the respective witnesses to their apparent veracity, their demeanour, their character, their situation, the probability of their relation, are circumstances, all of which are to be carefully and attentively brought into the account. The opportunity of confederacy, or the want of such opportunity, is a most important consideration in determining the effect of numbers. The concurrence in speaking of one observation of one detached fact, is of much inferior value to the concurrence of persons speaking from detached and separate observations of different facts leading to the same conclusion. I have already had occasion to advert to the accordance or variation of witnesses speaking of the same occurrence, to the difference between that inconsistency which essentially fastens itself upon the substance of the relation, and that which

## CROSS-EXAMINATION

may be fairly referable to different degrees of accuracy or minuteness, in the observation or memory of facts which have actually occurred; and to the unity and accordance, which, being too strict and circumstantial, are inconsistent with that diversity of observation and expression that naturally occurs in the unprepared account of a real transaction, and afford an indication of concert and design. It is not an unfrequent observation that if one of the witnesses in support of a cause is not entitled to be credited, the discredit attaches to the cause and extends to other witnesses apparently unexceptionable. This kind of objection is, I think, sometimes applied too generally, and without using that caution and discrimination which the principle of it essentially requires. In case the impeachment of the veracity of a particular witness results from circumstances that indicate management and fabrication in the cause itself; in case the perjury of the witness implies the subornation of the party; the whole system may be regarded as tainted and corrupt, unless there are in any other respects, superior reasons for believing the contrary; and the mere absence of circumstances of suspicion, directly affecting the other witnesses, will not destroy the presumption of falsity that has attached itself to the cause. But if the imputation upon the particular witness is merely personal; if it results in consideration foreign to the immediate cause; if it is founded upon some collateral motive of his own, and no suspicion of subornation can be fairly entertained; the cause in other respects should be at liberty to stand or fall upon its general merits, without being affected upon the peculiar objection; in the same manner as a series of reasoning, in itself perfect and complete, is not affected by the collateral of an untenable argument.

"The conflict of opposite witnesses is the grand source of forensic altercation. In adverting to the circumstances which influence the credit of witnesses individually or collectively, I have necessarily had occasion to mention their opposition. Without going through the particulars again, it will be sufficient, generally, to observe that whatever principles of reasoning are correct and proper when examining the veracity or accuracy of an individual witness or a number of witnesses uncontradicted, become more peculiarly important in determining the balance of credit, with respect to veracity, or the superior degree of accuracy, upon matters of judgment and observation, in cases of conflict and opposition. The general ground of credit, founded upon the presumption that a witness speaks with truth and accuracy, is destroyed, when the respective assertions are in opposition to each other, and therefore cannot be both true. Whatever, therefore, may establish or diminish the confidence in a witness, whose testimony is uncontradicted, will determine the preference in cases of opposition; but the respective grounds of assent or discredit are sometimes so equally balanced, that the mind cannot, with satisfaction, pronounce a judgment between them; and all that can be recommended is a calm, patient, and anxious investigation. Where the possibility of mistake on the one side is contrasted with the imputation of perjury on the other, and there are no collateral circumstances to fix the determination, there can be no doubt but that a casual error is to be deemed more probable than a wilful misrepresentation. When the judgment, after every exertion, is reduced to the necessity of deciding, that on the one side or the other, there has been an intentional falsehood, and no satisfactory reasons occur for fixing the superiority of credit; the last resource is to obliterate wholly the conflicting testimony, and to determine upon the want of a preponderance in proof, according to the rule which must have prevailed in the total absence of it. The result of an investigation of evidence will, after the most enlightened and painful research, be, in many cases, unfortunately at variance with the actual truth, but in proportion to the dangers of error inherent in the very frame and nature of the subject, should be the care and anxiety exercised in the avoidance of such error as may proceed from an excess of confidence on the one hand or of

caution on the other ; and although that care and anxiety will often fail in their particular application, the perfection of human precaution will be attained, if they are so conducted that according to the principles of reason and experience, they may be expected in general to succeed.

### Character as Affecting Damages

S. 55, Evidence Act, lays down that :—"In civil cases the character of any person is such as to affect the amount of damages which he ought to receive is relevant.

*Explanation.*—In sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition ; but except as provided in Section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown."

The bad character of the plaintiff affects the amount of damages in the following three cases :—(1) In suits for damages for defamation, and in prosecutions for defamation, evidence of the bad character of the plaintiff or the prosecutor is admissible in mitigation of damages and fine ; but evidence of rumours and suspicions of bad character cannot be received. 1932 N. 158 : 141 I. C. 438 : 34 Cr. L. J. 154 : 1932 Cr. C. 863, 4 L. 55 : 73 I. C. 805 : 1923 L. 225 : 24 Cr. L. J. 693. 37 C. 760 : 6 I. C. 81, Taylor. S. 359, 37 C. 760 : 8 I. C. 81 ; (2) In actions for breach of promise to prove that the plaintiff is a person either of bad character or of coarse and brutal manners. *See* Taylor, S. 358. (3) In a claim for damages against an alleged adulterer, the defendant may prove that the plaintiff has been guilty of notorious infidelity or has otherwise been guilty of dissolute conduct. *Ibid.* Evidence of general repute is admissible. 1934 A. 735. A man's character is the reality of himself, his reputation is the opinion others have formed of him.

**Relevancy of Evidence as to Character** :—Section 146, Evidence Act, provides that when a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions. (1) to test his veracity, (2) to discover who he is and what is his position in life, or (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

In determining the relevancy of character as affecting the credit to be given to a witness, the first question is, what kind of character is relevant ? Since the argument is to be against or for the probability of his now telling the truth upon the stand, it is obvious that the quality or tendency which will here aid is his quality or tendency as to truth-telling in general, *i.e.*, his veracity, or, as more commonly and more loosely put, his character for truth. This must be, and is universally conceded to be, the immediate basis of inference. Character for truth is always and everywhere admissible. Moreover, any other trait or quality, or combination of them, is relevant only so far as involving, necessarily or probably, the presence of this quality as to truth-telling. Wigmore, S. 922. In other system of evidence there is considerable controversy on the question whether, in order to impeach the character of a witness only evidence of some specific bad quality in the witness's character is admissible or whether evidence may also be given of the witness's bad moral character in general. The Act avoids this controversy by leaving it to the discretion of the trial Court to determine whether the trait in witness's moral character, or the incident in the witness's life, which is sought to be brought out in cross-examination would or would not, in the circumstances of the case, materially affect the Court's opinion as to his veracity. When a question is put to a witness, which is relevant only to impeach the credit of the witness by injuring his character, the Court has to

decide whether the question should or should not be allowed and the Court may, if it thinks fit, warn the witness that he is not bound to answer it unless so ordered by the Court. In determining whether the witness should or should not be ordered to answer the question, the Court will consider whether the truth of the imputation would or would not seriously affect its opinion as to the credibility of the witness on the matter to which he has testified. The answer to this question would depend on the time and character of the imputation conveyed and the importance of the evidence which the witness has given. *See* S. 148, Evidence Act. Where the fact which forms the subject of the question are comparatively recent, they are more important as bearing upon the moral principles of the witness than when they are of remote date, because a man may reform and become in later years incapable of conduct to which in earlier life he was prone. All inquiries into discreditable transactions of a remote date will in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigants. *Taylor*, S. 1460.

If a woman prosecuted a man for picking her pocket, it would be monstrous to inquire whether she had not had an illegitimate child ten years before, though circumstances might exist which might render such an inquiry necessary. A Magistrate should not allow a question as to a previous conviction thirty years old to be put to an intended surety, as the question relates to a matter so old in time it ought not to influence his decision as to the fitness of the surety. 26 A. 371. It should not, however, be supposed that a question relating to prior character can never be allowed. The correct rule is, that prior character at any time may be admitted, as being relevant to show present character, and therefore, indirectly, to show the probability as to truth-speaking. The only limitation to be applied is that the character must not be so distant in time as to be void of real probative value in showing present character. *Wigmore*, S. 928.

On an indictment for rape, or for an attempt to commit rape, or for an indecent assault, the principal female witness may be cross-examined with the view of showing that she has previously been guilty of incontinence with other men, though her answers to such questions must be taken as conclusive and cannot be contradicted by calling her supposed paramour. *See Taylor*, S. 1441.

The great question, therefore, whether a witness is bound to answer a question to his own disgrace has not yet undergone any direct and solemn decision, and appears to be still open for consideration. The truth or falsehood of testimony frequently cannot be ascertained by mere analysis of the evidence itself; the investigation requires collateral and extrinsic aids, the principle of which consists in a knowledge of the source or depository from which such testimony is derived. The whole question resolves itself, into one of policy and convenience—that is, whether it would be a greater evil that an important test of truth should be sacrificed, or that, by subjecting witnesses to the operation of this test, their feelings should be wounded, and their attendance for the purposes of justice discouraged. The latter point seems to deserve the more serious consideration, since the mere offence to the private feelings of a witness who has misconducted himself cannot well be put in competition with the mischief which might otherwise result to the liberties and lives of others. No great injustice is done to any individual upon whose oath the property or person or security of others is to depend, in exhibiting him to the jury such as he is. As to the other consideration, it does not seem to be very clear that by permitting such examination any serious evil would result.” *Starkie on Evidence*, p. 211.

S. 146 Ev. Act extends the power of Cross-examination far beyond the limits of S. 138 (2) Ev. Act, which restricts the cross-examination to relevant facts. As to what facts are relevant and what are not, reference may be made to S. 148 Ev. Act, which also provides when a witness may be compelled to answer questions.

S. 149 Ev. Act enacts a proviso to the effect that no such questions as is referred to in S. 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it convey is well-founded. If the Counsel is well instructed that an important witness is a dacoit this is a reasonable ground for asking the witness whether he is a dacoit. Similarly if a witness cannot give satisfactory account regarding his means of livelihood, he may be asked if he is a dacoit, *vide* ill. (a) and (b) S. 149.

Accused was charged with stealing a lady's coat. She deposed that incident took place when he tried to kiss her in the cab and she resented it. Counsel questioned her whether she spent a night in the hotel together and was on familiar terms with him in as much as she allowed him to photograph her in the nude. Held, questions were improperly disallowed. They were directed to show that she was unworthy of credit. *Rex. v. Jenkin* 173 L. T. 311=(1912) 2 K. B. 464=107 L. T. Rep 31.

**Contradicting the Character Evidence.**— The general rule is that witness as to character cannot be contradicted. S. 153, Evidence Act, provides that "When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence." *See* S. 153, Evi. Act. *See* 1928 P. C. 54: 108 I. C. 1: 6 Bom. H. C. 93. 50 C. W. N 545. The reason of the rule is, that questions asked with the sole object of shaking the credit of a witness bring in their train many matters irrelevant or foreign to the inquiry, and if the parties be allowed to adduce evidence to contradict them, it is bound to draw away the mind from the points in issue, and to protract the investigation to an embarrassing and dangerous length. If the rule were otherwise, there would be no end of proving collateral issues, and the real points in dispute would be lost sight of. 6 B. 93: 47 C. L. J. 550: 1928 P. C. 54: 108 I. C. 1. (P. C.), *Taylor* S. 1439. Another reason for the rule is that a witness cannot be expected to come prepared to defend in cross-examination all the actions of his life. *Taylor*, S. 1439. If a witness has offered to sell his evidence to a party which is refused, the fact, if denied by the witness may be proved. 1928 P. C. 54: 108 I. C. 1. The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time is admissible, though the prosecution witness was not cross-examined on the point. 11 Bom. H. C. R. 166.

S. 155 Ev. Act provides that the credit of a witness may be impeached by the evidence of persons who testify that they from the knowledge of the witness believe him to be unworthy of credit. The question whether a witness is entitled to credit or not must be decided by the Court on the evidence before it and on the estimate formed by another Judge in a previous case, disbelieving the witness. 1927 P. 161=5 P. 777, 162 I. C. 300, 4 C. W. N 684 (685). Similarly disparaging comments made by a judge on the witnesses' conduct or testimony in another trial are inadmissible 2 C. P. D. 53 S. 155 does not allow evidence of witness's general bad character to be brought in. 1930 Ind. Rul. 91, questions with reference to statements made by one witness to another are admissible, though Court can refuse to rely on them on the ground that they had not been put to the witnesses concerned for explanation. 1939 N. 13=40 Cr. L. J. 593.

**In Civil Cases :—**S. 52, Evidence Act, lays down that :—"In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant."

"The rule of exclusion of evidence of character does not apply when, according to the rule of substantive law applicable to the case, the character of a party is a fact in issue. Under the general law of defamation, the truth or otherwise of an imputation of bad character is a fact in issue, and evidence on this point will therefore be received. Thus in an action for a libel, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being ladylike or good tempered," general evidence of her competency, good temper and manners was received; and where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness, with whom she had previously lived, was allowed to testify to her antecedent general good conduct." *See Taylor, S. 355.* Under the Punjab custom, the unchastity of a widow involves a forfeiture of her life interest in her husband's property; and under Hindu Law, a forfeiture of her right to maintenance. Therefore, where the question is whether a widow governed by the Punjab custom has forfeited her life interest, or a Hindu widow, her right to maintenance, by reason of her unchastity, evidence of bad character will be admitted without question. Similarly, a Mohammedan woman, otherwise entitled to the custody of a boy or girl, is disqualified by gross and open immorality, and where her right to the custody of a minor is attacked on this ground, evidence of her immoral character will be admitted as a matter of course." *See Munir's Evi. Act, p. 416.*

"When the character of a party is not in issue but the evidence of character is tendered for the purpose of rendering probable or improbable any conduct imputed to him, it will be rejected as inadmissible. If A sues B on a promissory note, the execution of which is denied by B, evidence of the fact that A is a habitual forger of promissory notes will be inadmissible. In a divorce case, the husband cannot, in disproof of a particular act or cruelty, tender evidence of his general character for humanity." *See Woodroffe, Evi., 8th Ed., p. 452.*

**Of Witnesses to Character :—**S. 140, Evidence Act, provides that witnesses to character may be cross-examined and re-examined. The bad character of the accused is irrelevant except where this fact is in issue but if evidence of good character of the accused is given under S. 53, Evidence Act, not only may the witness as to good character be cross-examined under S. 140, Evidence Act, but independent evidence of bad character may also be given under S. 54, Evidence Act. *See S. 54, Evidence Act.* The sound rule is not to attack a man's character unless you have got a record of it. *See 11 Cr. L. J. 83.*

**By Previous Statement :—**S. 145, Evidence Act, provides that a witness may be cross-examined as to previous statement made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Where a witness is properly contradicted by a previous statement as to a relevant fact, which is inconsistent with his testimony in Court, the question sometimes arises whether the previous statement can be treated as substantive evidence, *i.e.*, evidence of the facts mentioned in the previous statement. For instance, if a witness states in Court that the assailant was of a fair complexion, but it is proved that the witness on a previous occasion stated that the assailant was of a



dark complexion and the witness, on being confronted with the previous statement, either denies having made it or is made to explain the contradiction, can the previous statement be treated as evidence of the fact that the assailant was of a dark complexion? Professor Wigmore, in the latest edition of his work contrary to the opinion expressed in a former edition, thinks that "there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve," *see* S. 1018 (b), Wigmore, but in India there is a uniform course of decisions to the effect that, unless the previous statement is relevant under some section of the second Chapter of the Act the statement, whether it be a deposition, 1930 O. 406 : 127 I. C. 873, 1927 A. 705 : 103 I. C. 677, 1925 L. 483 : 27 Cr. L. J. 289, 10 I. C. 119 : 12 Cr. L. J. 214, or a statement in the first information report, 8 L. 605 : 105 I. C. 807, 1928 L. 913 : 116 I. C. 187, or statement made to the police, 8 L. 605 : 105 I. C. 807, 1925 L. 483 : 27 Cr. L. J. 289, 76 I. C. 572 : 1923 A. 469, or a statement made on any other occasion, 127 I. C. 850 : 1930 L. 409, 34 I. C. 129 : 1930 L. 409, 26 M. 191, 34 C. 129, 1922 M. 303 : 23 Cr. L. J. 262, is not substantive evidence, and is admissible only for the purpose of impeaching the credit of the witness. The subject-matter of the statement on which the witness is cross-examined under S. 145, or which is sought to be proved under S. 155 (3) to contradict him, must be relevant to the matters in issue. *See* Ss. 145 and 155 (3), for a witness cannot be questioned on, or contradicted by proof of inconsistent statement as to irrelevant independent collateral matter. *See* Ss. 5 and 155 (3) Evidence Act.

A witness may be cross-examined as to his previous statement in writing for two purposes. It may be to test his memory, and here the very object would be defeated if the writing were placed in his hands before the question was asked; or it may be to contradict him, and here it would be obviously unfair not to give him every opportunity of seeing how the matter really stands. Norton, 327. S. 145 does not say that the writing must be shown before the question is asked, it merely says that if it is intended to contradict him by the writing, his attention must before such contradictory proof can be given, be called to those parts of it by which it is intended to contradict him. 47 M. 800 : 92 I. C. 792 : 1925 M. 145. That is not that the witness is to be allowed to study his former statement and frame his answers accordingly; but that, if his answers have been different from his previous statements reduced to writing and the contradiction is intended to be used as evidence in the case, the witness must be allowed an opportunity of explaining or reconciling his statements. 15 W. R. Cr. 23. If it be intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or not he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and then the whole matter is brought before the Court at once. If the witness denies the utterance or claims the privilege of silence, the proof in contradiction will be received at the proper season. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity of answering and of offering such explanatory or exculpatory matter as I have before alluded to." (1820) 22 R. R. 662. This being the reason of the rule, it follows that the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned in the question. *See* (1865) 28 and 29 Vict., C. 18, S. 4. "Ordinarily, the cross-examiner in his question must specify the time when and the place where and



the person to whom the contradictory statement was made ; but the rule is not rigid one and will be deemed to have been complied with if the witness understood the occasion alluded to in the question." Wigmore, S. 1029. "A witness may always be interrogated in cross-examination as to the existence of statements made or acts done by him on some former occasion, inconsistent with, qualifying, or at variance with his present testimony. The object of course is to displace the trustworthiness of the witness, by the contradictions afforded by himself, or capable of being established *aliunde* against him. If he deny the contradictory matter, independent evidence may be given of it. Before this evidence can be given, however, by way of warning to the witness, his attention must be pointed to the occasion of the supposed contradiction, with all requisite allusion to time place, and circumstance ; and if in writing, the statements must be brought specifically to his notice." See Rahmat Ullah, p. 76.

It has been questioned to what extent such contradictory evidence can be gone into, where the witness neither admits nor denies the statement, but simply professes his forgetfulness of it. It is true the proof of the statement imputed to the witness, which he says he does not remember to have made, is not admissible as a contradictory statement, for, until further enquiry be made, there is no apparent contradiction ; but still, seems, the evidence should be admitted, for the imputed, imputed statement, when proved may be such as to amount to a direct contradiction of the witness, and may also possibly convince the jury that the witness did not speak truth in saying he did not remember making the statement. If the evidence were not admitted, it might happen that under the pretence of not remembering, a who has made a false statement, and who knows it to be false, would escape contradiction and exposure." Crowley V, page 7, Carrington Payne, p. 791. A witness may be cross-examined as to previous statement made by him in writing, or reduced into writing, relative to the subject-matter of the cause, indictment, or proceeding, without such writing having been shown to him, but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him. If it should appear from the cross-examination of the witness, or from any antecedent evidence that the writing in question has been lost or destroyed, the witness may be cross-examined as to the contents of the paper, notwithstanding its non-production ; and that if it were material to the issue, he might be afterwards contradicted by secondary evidence :—Still the question remains as to whether the cross-examining party might first interpose evidence out of his turn to prove the destruction of the document, or to show that it was in the hands of the opponent, that he had notice to produce it, and that he refused to do so, and might then cross-examine the witness as to its contents. In former times this course was deemed irregular, but modern authorities are not wanting to show that it would be generally allowed.

The Indian Evidence Act provides that a witness may by cross-examined as to previous statements made by him in writing, or reduced to writing, relating to the subject-matter of the cause, without such writing being shown to him ; but it declares at the same time that if it be intended to contradict such witness by the writing, his attention must be called to those parts of the writing which are to be used for the purpose of contradiction. The Act contains a provision that "it shall be competent to the judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the trial as he shall think fit." It will be observed that the Indian Act is not restrictive to the case of civil proceedings. In England, too, the same rule is now extended to all Courts, both civil and criminal. 28 and 29 Vict., C. 18. The Indian Act, like the English, is silent as to the case in which the writing itself has been

lost or destroyed, or is not otherwise forthcoming. It is apprehended, however, that in such a case the ordinary principle would apply, and secondary evidence become admissible, and this the opinion entertained by English text-writers in reference to the clause in the English Act. Taylor on Evidence, Vol. II, p. 1255.

Ordinarily speaking, the original document containing the contradiction, when in fact producible, is that which should in strictness be produced to the witness. In the instance, however, in which this is some record of Court,—as, for example, a written statement, deposition, or affidavit in some proceeding, and the removal of the record might be attended with practical inconvenience, it is presumed that the Court might in its discretion dispense with the original, upon production of the usual office copy of the record. Taylor on Evidence, Vol. II, p. 1255.

Mere opinions given by the witness, on some former occasion, would not form matter for contradicting his statement, unless the opinion were in itself a matter of evidence,—as for instance, in the case of opinion on handwriting, a question of science or so forth, the witness being examined as an expert. Accordingly, a witness having been asked in cross-examination whether on a former occasion he had not expressed an opinion, adverse to the merits of the side he was then supporting by his testimony, *viz.* “that the defendant had not a leg to stand upon,” and having denied it, evidence in contradiction of the denial was refused. *Elton v. Larkins*, 6 Carrington and Paine, p. 385. If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, or respecting a character of the handwriting his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness, or if any question be put respecting its contents, a sight of the document may then be demanded by the opposite counsel. Taylor on Evidence, Vol. II, p. 1259.

The following decisions will be found useful :—

A report of an offence not made at or about the time of the occurrence to an officer, who has no power to investigate the matter, can be used to impeach the credit of a witness, but cannot be used to corroborate him under S. 157, Evidence Act. 55 C. 879 : 1928 C. 732 : 29 Cr. L. J. 823 : 111 I. C. 327. Statements made by witnesses to Police cannot be used by Court for contradicting them. 1925 C. 147 : 27 Cr. L. J. 277.

Statements made by a witness signed before the Manager can be used to contradict the statement made on oath at the trial. 1922 M. 303 : 23 Cr. L. J. 262. Where in the Sessions Court witnesses retracted their statements before the Committing Magistrate, the statements made to the Police and the Committing Magistrate are relevant to contradict their evidence before the Sessions Court given in place of their retracted statements. 46 B. 97 : 1922 B. 108 : 22 Cr. L. J. 636. First information report can be used to contradict the witness making it. Court cannot rely on the report and discard the evidence given on oath. 1924 A. 164 : 74 I. C. 716 : 24 Cr. L. J. 812.

In rape case the general immoral character of the woman is relevant evidence. 1926 C. 320 : 92 I. C. 439 : 27 Cr. L. J. 263.

A witness cannot be contradicted under S. 155 by previous statement made by him unless his attention is drawn to it as laid down in S. 145, Evidence Act. 127 P. L. R. 1914 ; 1943 A. 49 O. 1939 C. 252, 1937, 201—166 I. C. 259, 1945 C. 159 ; 1946 N. 321, 43 Cr. L. J. 693.

Evidence of a witness hostile to the Crown may be impeached by reference to the Police diary. 45 I. C. 272 ; 19 Cr. L. J. 512. Where a previous deposition of a witness is relied upon to impeach his credit under S. 155 (3), Evidence Act, the contradictory statements alone can be admitted in evidence.

15 Cr. L. J. 621. The credit of a witness can be impeached by his statement to Police, though no person is bound to state truth before the Police. The statement to Police is not evidence like a statement made on oath before a competent authority. 41 I. C. 668 : 18 Cr. L. J. 844. When a witness is cross-examined with regard to his previous statement before the Police, the Police Officer who recorded or heard his statement can be examined to prove the statement under S. 155, 34 C. 129.

A statement by J to H was reported at the *thana* by the latter and there recorded. Held, that though the evidence of J could be contradicted, by the evidence of H, it could not be contradicted by what Police recorded as first information report. 8 C. W. N. 218 (221).

The previous contradictory statement is not admissible as proof of facts therein asserted. It can be only admitted to impeach the credit of a witness and for the purpose of neutralizing or raising doubt or suspicion as to those parts of witness's testimony with which the contrary statement is at variance. 1905 A. W. N. 64, 26 M. 191., 47 Cr. L. J. 450.

Judgment in another case in which witness was disbelieved is inadmissible under S. 155 (1). Evidence Act, to impeach his veracity. 1927 P. 61 : 5 P. 777, 4 C. W. N. 684. Evidence may be given that the witness brought some cases that were dismissed or decreed against him, or that the witness made false charges, etc. 4 C. W. N. 684. A conviction 80 years old must not be allowed to be put to witness. 26 A. 371.

If the good faith of a witness is not questioned, evidence of previous statement is inadmissible without previous cross-examination of the witness. 1936 P. C. 289. It is not necessary that the Previous statement must have been reduced to writing by a person having jurisdiction to do so. 24 P. 623. A letter written by a witness is no evidence of the facts therein stated. It can be used to contradict him. 1945 P. C. 74.

### Illustrations

(i) The Land League having been charged with terrorising and intimidation of the people at large, a Catholic priest who was president of one of the branches was examined for the defence as to the methods of the League. Examination-in-chief was as follows.

Q. "Was any kind of pressure or intimidation exercised to your knowledge to make people join the League?"

A. "No : things were done in a very regular way. A notice was posted up asking the people to come and join the League. Those who wished to do so then came and paid their subscription. There was no house-to-house visit, there was no pressure whatever, it was perfectly free." Cross-examined by Mr. Murphy :

Q. "Nothing particular was done, I understand you to say to induce people to join the Land League?" A. "Nothing in my district."

Q. "Are you quite certain?" A. "Quite certain."

Q. "I will call your attention to some of your own speeches. On the 12th of December, 1880, speaking at Craughwell you say, 'I tell you that the wretch who has not joined the League, that that man deserves to go down to the cold, dead damnation of disgrace.' That is pretty strong?" A. "Yes."

Q. "Did you use those words?" A. "It is possible."

Q. "Did you use them?" A. "I may have."

Q. "Have you any doubt about it?" A. "I never saw it in print."

Q. "Did you use that language?" A. "Very likely I did,"

Q. "Do you regard that as an invitation to join the League voluntarily or involuntarily?"

A. "Well, it does not involve any intimidation."

Q. "To go down to the cold, dead damnation of disgrace?"

A. "Well, it is rather a strong expression. I admit."

Q. "Did you believe that that was the proper fate for anyone who did not join the League?"

A. "Well, I suppose I used it in order to induce them to join."

Q. "Did you use the expression in order to frighten the people?"

A. "I suppose it was in order to induce them to join the League." Parnell Commission's Proceedings, 230, 231. 78th day, *Times*' Rep., pt. 21, pp. 225. See Wigmore, 1868.

(ii) Certain letters, purporting to be Mr. Parnell's, and approving the Phoenix Park assassinations, had been sold to the London "*Times*" by one Richard Pigott, an Irish editor and informer. These letters had been in fact fabricated by Pigott, himself, but until he came under Sir Charles Russell's cross-examination the case for the letters' genuineness was strong. The word "hesitancy" occurred in one of the letters and this with other words had been written down by Pigott at the opening of his cross-examination.

Q. "Yesterday you were good enough to write down certain words on a piece of paper, and among them was the word 'hesitancy'. Is that a word you are accustomed to use?" A. "I have used it."

Q. "Did you notice that you spelt it as it is not ordinarily spelt?" A. "Yes I fancy I made a mistake in the spelling."

Q. "What was it?" A. "I think it was an 'a' instead of an 'e' or *vice versa*. I am not sure which."

Q. "You cannot say what was the mistake, but you have a general consciousness that there was something wrong." A. "Yes."

Q. "I will tell you what was wrong according to the received spelling. You spelt it with an 'e' instead of an 'a'. You spelt it thus, 'hesitancy'. That is not the received way of spelling it." A. "I believe not."

Q. "Have you noticed the fact that the writer of the body of the letter of the 9th of January, 1882—the alleged forged letter—spelt it in the same way?"

A. "I heard that remark made long since, and my explanation of my mis-spelling is that having that in my mind I got into the habit of spelling it wrong."

Sir C. Russell: "Did your Lordships catch that last answer?"

The President: "Oh yes."

Q. "You say that your attention was called to the fact a long time ago that in the alleged forged letter 'hesitancy' was misspelt, and you fancy that, your attention having been called to the mis-spelling, you so got into the habit of spelling it in that way?"

A. "I suppose so; I heard so much discussion about it. I never met anybody who spelt every word correctly, scarcely. (*Laughter*)".

Q. "It had got into your brain?" A. "Yes, somehow or other."

Q. "Who called your attention to it?"

A. "Several people, it was a matter of general remark."

Q. "Do you think that but for the fact of your attention being drawn to the way in which it had been spelt you would probably have spelt it rightly?"

A. "Yes."

Q. "You know that the above letter purports to be dated the 9th of January, 1882; you have already told me that this letter (handing another letter, witness) is yours?" A. "Yes, that is my letter."

Q. "But you did not become possessed of this valuable (Parnell) letter to dated January 9, 1882, until the summer of 1886;" and this letter (of yours) is prior to that. The wrong spelling had not got into your head then." A. "No, I say that spelling is not my strong point."

Q. "Did you notice that in this letter you spell 'hesitency' in the same way?" A. "No, I did not."

Q. "How do you account for that? Your brain was not injuriously affected at that time?" A. "I cannot account for it."

Q. "At all events you cannot account for it by that disturbance of your brain?" A. "No."

Parnell Commission's Proceedings, 55th day, 'Times' Rep., pt. 14, p. 252, Sir Wigmore, p. 1368.

(iii) Q. "I believe, Sir, that you do not agree with Mister Smith's evidence?" A. "No. It is false, every word of it."

Q. "I see; now tell me, Sir" turning to the jury and raising his voice "is it true that you who charge my client with perjury are an undischarged bankrupt?" The witness protested, but the Judge ordered him to answer.

A. "It is true."

Q. "Very well then." His voice here dropped again. "Is it true, Sir, that your application for discharge was refused on the ground that you had been guilty of fraud as a trustee?" A. "I——"

Q. "Is it true, Sir?" louder.

A. "Well, the report said so, but it was wrong."

"Thank you: that is all I have to ask," said the counsel, and slowly and without effort he sank into his seat, his work completed. 5 M.L.T. 108 (Jour)

On the trial of Colonel Despard in 1803 for high treason, Lord Nelson called as a witness to his character. Speaking of a particular time during which they had served together, Lord Nelsons said: "In all that period of time, no man could have shown more zealous attachment to his sovereign and his country than Colonel Despard did. I formed the highest opinion of him at that time as a man and an officer, seeing him so willing in his services of his sovereign."

He was cross-examined thus:

Q. "What your Lordship has been stating was in the year, 1779—1780?" A. "Yes."

Q. "Have you had much intercourse with Colonel Despard since that time?" A. "I have never seen him since 29th of April 1780."

Q. "Then as to his loyalty for the last twenty-three years of his life, your Lordship knows nothing."

A. "Nothing." See Trial of Col. Despard, p. 174.

## CHAPTER 60

### In Defamation Cases

Defamation is the only case in which the whole character of the complainant is in question. General bad character of complainant can be proved in such a case. 1923 L. 225 : 4 L. 55 : 24 Cr. L. J. 693. If it is proved that the complainant had notoriously bad reputation as a bribe taker, the imputation made as to his having taken a bribe on the particular occasion, even if

fails, could not damage his reputation as he had none to lose. 4 L. 55 : 1923 L. 225.

**Illustrations.** (i) A woman brought a complaint against the accused for defamation of character on the ground that he made an imputation against her chastity by publishing a scandal that the complainant, though a widow, was pregnant. The complainant further alleged that the accused defamed her when he said that she had illicit intimacy with one S. which according to her was untrue. The accused pleaded not guilty and said that the allegations were all true. He requested the Court to have medical examination of the woman but she refused to have herself medically examined. Under the law she could not be compelled to undergo a medical examination without her consent. The law is very clear on the point and it has been held that any defamation based on allegation that a woman has had illicit intimacy, she cannot be compelled for medical examination against her consent and her refusal to do so is not evidence against her. 1930 L. 159 : 31 Cr. L. J, 584 : 123 I. C. 841. Similarly, in a rape case the fact that woman did not offer herself for medical examination cannot weigh against her. 1935 N. 69. The accused in his defence produced as many as 15 persons of the village to prove that the complainant had illicit connection with S. The Magistrate accepted the testimony of the defence witnesses as true and acquitted the accused. This illustration shows that it is always risky to move the Criminal Court in such matters.

**Defence by Accused.**—The following defences are open to the accused in a prosecution for defamation under S. 500, I. P. C.:—Ordinarily it is for the witness to claim protection under S. 132, Evidence Act, at time of giving self-incriminating answer and to prove it as a defence to prosecution for defamation. 1928 N. 58 : 28 Cr. L. J. 996. Although it is for the prosecution to make out a case for conviction, it is for the accused to bring the case under special exceptions of S. 499, I. P. C. 1928 N. 58 : 28 Cr. L. J. 996, 1924 A. 299, 46 A. 64 Diss. Even if the accused denies having made a statement, he is entitled to call evidence to prove circumstances that would bring the case under the exceptions. 1928 R. 167 : 113 I. C. 816.

A plea that though there was publication of statement, there was no publication to person mentioned in the charge is a highly technical plea only. 1927 Sind 58 : 96 I. C. 499 : 27 Cr. L. J. 947. Advocates in India have no unqualified and absolute privilege like the English Common Law in respect of questions asked in cross-examination. 1927 C. 823 : 28 Cr. L. J. 877 : 55 C. 85, 1926 P. 499 : 6 P. 224, 105 I. C. 820 : 1928 N. 58.

Proprietor of newspaper is not responsible for publication of defamatory articles by a competent editor. 12 P. R. 1883 Cr.

Accused can plead that the imputation amounted to fair comment. But to claim such exemption it is necessary that the accused should have made due inquiry. Some allowances for intemperate language should always be made if the writer keeps himself within bounds of substantial truth. 13 Bom. L. R. 1187. But an accused justifying his libel cannot both deny as well as justify it. 19 Cr. L. J. 129. Fair comment means expressing an opinion in good faith. 9 Mysore L. J. 12.

Accused can plead good faith. He can say that the communication was addressed in good faith. Good faith in the 9th exception to S. 499 requires no logical infallibility but due care and attention. 1929 C. 779, 1929 M. W. N. 598. The onus is always on the accused to prove good faith. The question whether he committed mistake of fact or law does not arise. S. 79, I. P. C., does not apply. 1923 C. 470 : 50 C. 518.

Accused pleaded that the alleged statement was made at a privileged occasion. 1929 R. 88, 1934 O. 8, 1930 O. 69, 1934 P. 548, *e.g.* where a Municipal Engineer reported that the road metal was removed by the contractor, 1934 P. 539, or informing the authorities that public money is being defalcated, 1944 A. 8. Accused can also plead that the alleged libel was never published by him, *e.g.*, communication to the person defamed only is not publication. 1935 C. 738, 7 A. 205, 7 C. W. N. 74. It may be remembered that it is not necessary that the accused should himself utter defamatory words. It is enough if by conveying the words he adopted the words used by some one else. 1925 M. 320 : 26 Cr. L. J. 521. To prove the publication of a libel through newspaper it is sufficient to prove that the paper was circulated within the Postal area over which the Court has jurisdiction. 1928 A. 222 : 15 I. C. 872. The accused can also plead that the statement was made as party or counsel or as witness which was relevant to the case and was made in good faith. *See* law on the subject in Prem's Criminal Practice (Defamation-statements in Court or proceedings by counsel, Judge or party). He can also take defence that the matter published is true. 1933 Sind 403, and the accused is entitled to call evidence to prove that the allegations are true even though he deny making such allegations. 30 Cr. L. J. 238 : 1928 R. 167. He can plead that the alleged libel was contained in a police report or in a complaint to a Magistrate. But he must prove that he used the privilege only in good faith. 1923 A. 167, 17 Cr. L. J. 816 : 95 I. C. 840. He can also plead that under S. 198, I. P. C., the complaint is not by an aggrieved person. As to the proper person to make the complaint, *see* Prem's Criminal Practice (Defamation-complaint).

**Abusive Language** :—Abusive language is generally used in street quarrel or in same altercation. The Court should weigh the evidence on the point and should take into consideration the status of the parties. It has been generally seen that villagers use vulgar and abusive language without meaning anything thereby. With a number of illiterate persons "*Sala*" and "*Soor*" (pig), are common expressions. The Courts have held that words *prima facie* defamatory used in the middle of street quarrel should be regarded as mere vulgar and it does not amount to defamation. 19 Cr. L. J. 669 : 45 I. C. 1005.

The essence of the offence lies in harming the reputation of the complainant. Whether an insulting or abusive language amounts to defamation or not, the following decisions will be found useful :—Complainant's counsel could not find the book at the time of the argument who was asked to search for it in the accused's books. Accused resented it and said that he was not in the habit of stealing like him. Held, it is no defamation but akin to abuse and the matter was too petty to be brought in Criminal Court. 1929 L. 234 : 115 I. C. 72 : 30 Cr. L. J. 379. If abuse is calculated to harm the reputation of the complainant, it is defamation. 30 Cr. L. J. 4., but not when by way of protest. 1934 O. 169. Calling a person a beast and a pig is defamatory. 1925 C. 1121 : 26 Cr. L. J. 1539.

The words *Pichlag* and *Lawaris* do not amount to defamation. 1922 L. 452.

Inviting a person to dinner and asking him to leave place when he attends without any sort of imputation is no defamation. 1926 A. 711 : 98 I. C. 606 : 24 A. L. J. 893 : 27 Cr. L. J. 1390. Plaintiff's counsel questioned the authority of the Secretary of Municipal Board to sign and verify adding that his pay is only 10 Rupees. The Chairman of the Board remarked that his Secretary's status is higher than that of plaintiff's Pleader. Held, it amounts to defamation. 43 A. 497 : 1921 A. 30. Where defamatory words were used in a street quarrel and were vulgar abuses, it was held that there was no deliberate intention of harming the reputation. (1887) 1 Weir 607, 1883 A. W. N. 36, 1883 A. W. N. 167. *See* 45 I. C. 1005.

Where obscene and insulting words are used after the altercation is over, it is defamation. 30 Cr. L. J. 4, 16 Cr. L. J. 498, 45 I. C. 1005. Vulgar and abusive epithet are not sufficient in themselves to base Criminal Prosecution. 1936 L. 294=37 Cr. L. J. 1033. Hard words do not break bones. Words though strictly and literally regarded as defamatory, will not be actionable if all reasonable men take them as mere vulgar abuse. 43 Cr. L. J. 504 (F. C.)

**Newspapers Containing Libel:**—Newspaper libel is the worst kind of defamation. The newspaper goes in the hands of thousands of persons through the length and the breadth of the country and a person's character goes to pieces thereby. The position of the editors is also delicate one because they have to depend upon newspaper correspondents and have to rely upon their reports. As to the liability of the proprietor, editor or printer, see the following:—

A journalist is entitled to comment on matters of public interest and no suit will lie against him unless he has exceeded the bounds of fair comment or was actuated by malice. 25 M. L. J. 476 : 21 I. C. 625, 47 I. C. 449 : 20 Bom. L. R. 185. A newspaper is exactly in the position of an individual for defaming. 1929 C. 309. The proprietor of a newspaper is civilly liable for any libel appearing in its columns although it was made in his absence, without his knowledge and even contrary to his orders. 1929 C. 129. If the printer prints anything that is libellous it is no excuse to say that he had no knowledge of the contents. 26 C. L. J. 345. It is fallacy to suppose that there is some kind of privilege attached to the profession of the press as distinguished from the members of the public. The freedom of the journalist is extensive with an ordinary citizen. The journalist can go to the same lengths as any other subject and no further unless otherwise shielded. 41 C. 1023 : 18 C. W. N. 785 : 20 C. L. J. 161, 26 M. L. J. 621 : 23 I. C. 661 (P. C.), 1942 N. 117. False statements published in newspapers are not fair criticism. 26 C. L. J. 401. In a suit for damages against the editor of a newspaper the evidence of the defendant is irrelevant on the question of the innuendo. 1935 P. C. 34. It cannot be said that in every case the party if represented must appear through an advocate who is instructed by an attorney. 34 C. W. N. 928 : 1930 C. 759.

An expression of opinion in good faith is a criticism, any fair criticism is justifiable and not a contempt, if expressed in good faith. 26 C. L. J. 401.

To charge a Judge with presumptive tyranny for the mode in which he is proceeding in a matter pending before him or to publish anything respecting that matter whilst it is under consideration, with a view to induce the Judge to alter his course, is a grave contempt of Court. 26 C. L. J. 345.

Comment upon an advocate which has reference to the conduct of his case, may amount to contempt of Court. 58 C. 884 : 35 C. W. N. 189, 1931 C. 257 : 1931 C. 443. When a contempt is committed in the face of a Court it is that Court which is the proper tribunal to decide that matter. 1932 L. 502 : 138 I. C. 873, 1932 L. 543 : 33 P. L. R. 785 (F. B.). The general plea of absence of guilt includes a plea of fair comment, and if the newspaper contains comment which is separate from the report of the proceedings, the latter part may be defended under the plea of publication in good faith for the information of the public, while the part of forming comment may be defended under the general plea of fair comment. 1933 P. C. 36 : 141 I. C. 518. Though the defamatory matter may appear only to apply to a class of individuals, yet if the description in such matter is capable of being, by innuendo, shown to be directly applicable to any one individual of that class, a suit for damages may be maintained by him in respect of the publication. 62 C. 838 : 39 C. W. N. 845. The proprietor of a newspaper is liable to the person defamed, though he has no knowledge of the publication. 1936 L. 23 : 17 L. 332 : 157 I. C. 854. The editor, printer and publisher of a defamatory article in a newspaper are



each individually liable and they need not all be joined in the suit unless the plea of non-joinder is raised, but there can be no several suits on one cause of action. 1934 N. 226 : 152 I. C. 398. Plaintiff sued the newspaper for libel for publishing an interview inaccurately. The newspaper, after a lawyer's notice was served, published his letter with a not defending his reporter. Held, that the publication of the interview did not constitute a libel on the plaintiff. The editor was entitled to defend his reporter without importing that the plaintiff was a liar, and he having acted under the orders of the directors, was not guilty of malice. 1931 C. 81 : 129 I. C. 868. Where a report containing defamatory matter about an Insurance Company is published in a newspaper under the heading "Fraudulent Insurance Co. which rob poor people", the heading is defamatory. A defamatory imputation may be conveyed not merely by a direct statement but also indirectly by means of headings, head-lines, figures of speech and in various other ways. 1936 B. 114 : 161 I. C. 769. A newspaper is in no different position from an individual and it cannot give currency to a defamatory statement and escape upon the ground that it did not believe that which it had published. 1937 R. 105. Accused can plead that article is not defamatory and if it is so then it was published in good faith, 1944 M. 484.

Newspaper owe a duty to their readers to publish any or every item of news their that may interest them. But this does not make every communication relating to public interest, a privileged one. 43 Cr. L. J. 17 (21). If a newspaper publishes a letter criticising adversely a public performance, the writer of which is not traceable and the address given is fictitious there is no duty on the publisher to investigate the bonafide of the writer before publishing it. He is not deprived of the defence of fair comment. (1943) 112 F. J. K. B. 547, (1903) 2 K. B. 100. The Press author and publishers have no special privilege. They must show that attack on another's character was made for the public good and that it was made in good faith. 1942 N. 117=43 Cr. J. 856, 41 C. 1023 (P. C.)

**Privilege.**—There are certain privileged occasions and a statement although amounting to defamation will not form the basis of criminal prosecution or afford cause of action for a suit for defamation. As to what are privileged occasions, see the following cases :—

A libellous statement made by the Government in an appellate order is absolutely privileged. 37 M. 55 : 19 I. C. 353, 24 M. L. J. 429. Defamatory words published by the Governor-General in course of official duties are not actionable unless maliciously made. 39 M. 781 : 31 I. C. 224, 29 M. L. J. 280. Communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime or the security of public morals, are privileged. 22 A. L. J. 65. A suit for damages for defamation cannot be brought against the Crown. 18 C. W. N. 106 : 17 C. L. J. 75, 16 I. C. 922. An absolute judicial privilege does not extend to administrative tribunals. They will be protected if they established that they spoke the words complained of on a privileged occasion and the plaintiff fails to prove express malice. 1935 P. C. 8. An imputation of crime made in good faith by an employee against his employer made to a co-employee with a view to their making an enquiry in the matter privileged as it was made in the interest of the communicator himself. 42 M. 132 : 24 M. L. J. 673. Communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime or the security of public morals, are privileged. 22 A. L. J. 65. The doctrine of absolute privilege is not confined to statements made before Judicial Tribunals but also applies to statements made before a tribunal, which though not a Court in the ordinary sense of the word, exercises judicial function, *e.g.*, proceedings before an officer

under S. 75, Madras Estates Land Act. 1933 M. 537 : 144 I. C. 155. Statements made to Magistrate for the purpose of getting him to act within the scope of his authority are absolutely privileged. 1933 P. 35 : 11 P. 693, 40 A. 341, 48 C. 388. Statements made in the written statement and in the evidence are absolutely privileged. 1935 R. 80 : 154 I. C. 535.

Where the defendant stated that nothing was due from him and the application was made needlessly and out of spite after plaintiff had murdered the defendant's predecessor-in-title, it was held, that the statement was absolutely privileged. 1938 M. 537 : 144 I. C. 115.

If a pleader hands over the envelope containing the written statement to another, who is the Munshi of another counsel on his side in the case or to one who is a helper and a friend of his client, this fact does not constitute publication, and even it did, it must be held to be privileged. 1931 L. 246 : 134 I. C. 515. Where a pleader having put in a written statement, handed over the envelope containing its copy to the pleader in the Bar room, who wanted to read it out of interest the law on the point or out of curiosity, it was held, that it was privileged. 1931 L. 246. If a person has a reason to believe that public money has been defalcated, he has a duty to inform the authorities concerned and the information so given is privileged. 1934 O. 8 : 148 I. C. 427, 1929 L. 561, 1930 R. 177. The protection regarding privilege extends to all statements made by a party, pleader or witness in the suit, no matter whom it may relate to. 1938 N. 47 : 141 I. C. 362, 40 A. 341, 48 C. 388. In the case of qualified privilege, the onus is in the first instance to prove that the privilege exists. 1936 P. 309 : 162 I. C. 809.

A privileged occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made and the other party has a corresponding interest or duty to receive it. The reciprocity is essential. 1936 R. 332 : 164 I. C. 385. A report under S. 202, Cr. P. C., by an Inspector of Police through the Superintendent of Police, to a Magistrate, is absolutely privileged. No suit for libel lies against him in respect of allegations made in that report, whether malice existed or not. 1937 A. 90 : 167 I. C. 483.

A statement made by a party to his legal adviser by way of instructing him to reply to a notice received by him is not absolutely privileged, but is under the head of qualified privilege. No damage can be awarded without proof of malice. 1937 M. W. N. 1108.

A report submitted by an Officer of a Railway Company about the conduct of subordinate servant in response to requisition by higher officer is privileged, and the law will not presume malice. 19 Pat. L. T. 186. Where defendant gives a near relation information, slanderous in the absence of privilege, of the conduct of the wife of the plaintiff, the communication is privileged. 1938 P. 164 : 172 I. C. 642. Statements made in the course of official duty are not actionable. 1924 A. 848 : 46 A. 773. Statements made in the course of judicial proceedings are absolutely privileged. 1925 R. 15 : 84 I. C. 977.

If a person makes a report to the police, he must show that he honestly believed in the truth of the statement. Plea of qualified privilege does not arise where he sets up the truth of the statement. 1924 A. 535 : 46 A. 671, 43 C. W. N. 775. Defamatory statement in pleadings is not absolutely privileged. 65 I. C. 204. A defamatory statement made by a pleader in the course of the administration of justice is absolutely privileged. Question of malice cannot be considered at all. 1922 P. 104 : 1 p. 371, 1921 C. 525 : 66 I. C. 604. If the witness is

compelled to answer question under S. 132 Evidence Act, he is not liable for defamation. 54 I. C. 890. If defamatory statement is made in the pleadings, a complaint against a person to the police or to the Court is absolutely privileged. The aggrieved person can prosecute the complainant for lodging a false complaint and also for malicious prosecution. 47 I. C. 674 : 40 A. 311. Reasonable statements made by persons in the discharge of their duties either private or public under reasonable circumstances and honestly made are privileged. 1921 C. 282 : 48 C. 304. The statement of a Municipal Commissioner that the servant is a quarrelsome person after finding from his personal file, is not actionable. 1925 A. 762 : 47 A. 859. A remark by a witness irrelevant to the enquiry and without any question from Court is not privileged. 1926 L. 486 : 99 I. C. 751.

Defamatory statement contained in an application to a Court is absolutely privileged. 1929 A. 972 : 118 I. C. 657. Defamatory words were used by rival candidates in election. The occasion of the election was privileged one but the subsequent repetition by defendant was not privileged. 1927 M. 329 : 100 I. C. 90. A general list publishing defamatory statements against public servant is libel. 1927 L. 20 : 7 L. 491. Statements in petitions under S. 107, Cr. P. C., are absolutely privileged. 1926 M. 521 : 49 M. 315. If some defendants are entitled to claim privilege, they do not lose the same because others have acted maliciously. 1925 A. 762 : 47 A. 859.

A letter to the Commanding Officer of the complainant that he owed him debt and intimating that legal proceedings will be taken if not paid, is not privileged if malice is proved. (1943) 112 L. J. K. B. 430, 86 L. J. K. B. 849, 61 L. J. K. B. 409 = (1892) 1 Q. B. 431, (1930) 1 K. B. 130. Such malice may be inferred from the terms of communication itself *e.g.* strong language, or by any other fact showing spite, ill-will or indirect motive. *Ibid.* A lawyer signing pleading which is defamatory is not guilty of defamation unless facts disclose malice or bad faith on his part. 1945 L. 97, 19 B. 340, 1925 R. 345. As to privilege of Judge, parties and witnesses. *See* Prem's Criminal Practice 1947, 4th Ed.

**Witness's Statement if privileged:**—The witness is under an oath and he is bound to speak the truth, the whole truth and nothing but the truth. He cannot be excused from answering questions even if the answers are to incriminate him or to throw him open to criminal prosecution. *See* S. 132, Evidence Act.

The following cases will sufficiently throw light on the subject:—There is an obvious difference between the case of a witness giving evidence, who is bound by law to say all that he knows though the consequence may be that his evidence will include defamatory matter and who is, therefore, admittedly privileged, and a party making statements in pleadings conveying unwarrantable and irrelevant insult to the opposite party. 5 C. W. N. 293. If a party to a judicial proceeding is sued in a Civil Court for damages for defamation regarding the statements made therein on oath or otherwise, his liability in the absence of statutory rules must be determined on the principles of justice, equity and good conscience identical with the corresponding relevant rules of the Common Law of England. 24 C. W. N. 982, 32 C. L. J. 94, 48 C. 388, 59 I. C. 143 (F. B.) Statements made in the course of a judicial proceedings by a party or witness is not actionable. 5 W. R. 134, 10 M. 87, 14 B. 97, 1926 M. 521 : 49 M. 315. But it must be found out if such statement was relevant to the inquiry. 18 I. C. 331 : 11 A. L. J. 193. No civil action for damages lies against a witness or party for giving false evidence or for any statement made in judicial proceedings. But it is otherwise in case of pleading. 39 C. 164, 14 C. L. J. 31, 38 C. 880, 32 C. 756, 32 P. R. 1917 : 38 I. C. 978, 5 C. W. N. 293. In this country the question of civil liability for damages for defamation and questions of liability

to criminal prosecution do not, for the purpose of adjudication stand on the same basis. 24 C. W. N. 982 : 32 C. L. J. 94, 48 C. 388. Answer by witness to question on oath is privileged. 43 A. 92, 54 I. C. 890 : 18 A. L. J. 112, 40 A. 271. For other cases, *See* Prem's Criminal Practice 1947 Ed.

### Abusive Language Used by Judge or Magistrate.

Sometimes a Judge or Magistrate loses his temper and goes to the length of abusing a party or witness in Court. In such a case the Judge divests himself of that judicial authority and brings himself low to the level of an ordinary villager using such vulgar language. S. 197, Cr. P. C., bars the prosecution of public servants for acts done in the discharge of their official duty. S. 77, I. P. C., and the Commentary thereunder will show as to when a public servant is purporting to act in the discharge of his official duty. *See* Prem's Criminal Practice (Prosecution of public servants).

When sanction is necessary and is not obtained, no prosecution lies against the public servant. 1929 C. 714, 52 M. 347. Sanction of the Local Government is necessary even if the Magistrate exceeds his powers in doing his official duty. 1935 M. 319, 52 M. 347. If the Judge uses defamatory words in the judgment which do not bear directly on the matter in hand, there is a *prima facie* case. 1934 N. 123-35 Cr. L. J. 947.

The famous case *Laidman versus Hearsay* reported in 7 A. 906 illustrates the highhandedness of the Magistrates and Judges and its reproduction *in toto* will not be out of place.

This was a prosecution for defamation under S. 500 of the Penal Code, which was brought by Mr. George J. Laidman, Subordinate Judge and Judge of the Small Cause Court at Dehra Dun, against Captain A. W. Hearsay. The alleged libel was contained in a letter which was admittedly written by the defendant on the 25th February, 1885, to the Government of India, and to the Government of the N. W. Provinces, and published by him. The letter was in the following terms :—

"I was in the Court of the Sub-Judge of Dehra Dun and Mussoorie, on the 9th February, to give evidence in a law suit. 'Whilst waiting there, three respectable Rajpoot zamindars (nephews of the late Saroop Dass, Mohunt of Dehra) entered the Court, where a case in which they were interested, and which had been returned to the Sub-Judge's Court by the High Court for rehearing and revision was to be heard on that day. "When Mr. Laidman, C. S., the Sub-Judge looked up and saw them, he burst out into abuse in the following words :—'*Soo s* (pigs), *badmashes* (bad characters), *haramzudas* (bastards), '*Tum hamare degre High Court ko appeal kiya;*' and then again repeated the three obnoxious and abusive epithets, ordering them out of the Court till their case was called on. "As I left the Court, these three men (whom I have known for upwards of twenty years to be quiet, respectable, high caste Rajpoot zamindars), came and asked me if I had heard the Sub-Judge *gali karo* (abuse) them, and if I had noticed what he said. I replied that I had. They then inquired "Where shall we get justice? This is the Magistrate (*Hakim*) who will have to re-hear our case. We are poor men : will you on our behalf report this *zulum* (injustice, oppression) that we have suffered from the Sub-Judge?" I said I would, as I thought it most disgraceful and contrary to law that a Covenanted Bengal Civilian, holding the position of a Sub-Judge, should be guilty of such a gross abuse of authority whilst sitting on the Bench to administer Justice! That the conduct of Mr. Laidman was a criminal offence, he having been guilty of criminal defamation of character by the use of offensive, abusive, and injurious expressions to respectable native litigants, who, in the ordinary course of business, had to appear before him for the purpose of urging a just claim in the prosecution of a

civil suit : and also criminally, as such language, if used to any Englishman, would most undoubtedly have led to a breach of the peace. "In my humble idea, I consider it a public duty to bring such a gross and wanton dereliction of duty to your notice, as a continuance of such unjust and oppressive conduct and language is liable, in the eyes and opinion of the natives of this country, to bring general discredit and contumely on the whole Civil Service of India, unless some wholesome example is made. I consider the conduct on the part of the Sub-Judge in question not only illegal and cruelly oppressive, but also ungentlemanly and cowardly in the extreme, as he would not have dared, under the circumstances we have related, to have addressed such language to any of his own countrymen. I have only further to add that the Sub-Judge Mr. Laidman, when officiating for the Superintendent of the Dun in the end of 1883, fined a gentleman in Mussoorie the sum of Rs. 300 for saying in a privileged conversation that the Municipality were a sea of pigs : so he should have been the last person in India to have used that offensive epithet *soor* to any individual, still less to respectable Hindu zamindars who appeared before him for justice. "In conclusion, I feel confident that after the perusal of this, you will grant these men full investigation and ample redress from the insults they have received from a member of the Covenanted Civil Service of India. Mr. Laidman, still more to annoy and distress these men, has already postponed the rehearing of their case on three occasions, thus causing them unnecessary expense and delay. I have the honour to be, your most obedient servant, A. W. Hearsey, *Captain, Retired List, Her Majesty's Service.*" "This is not an isolated case of Mr. Laidman's abusing respectable natives in his Court. When the time comes, I can produce several others whom he has treated in a similar manner."

Upon obtaining a copy of this letter, Mr. Laidman, to whom sanction was given by Government for the prosecution of Captain Hearsey, demanded an apology, and, this having been refused, instituted proceedings, which resulted in the committal of the defendant for trial by the High Court. The complaint filed by Mr. Laidman in the Court of the Assistant Magistrate of Dehra Dun, and the charge-sheet in which the Magistrate committed the defendant for trial, substantially covered the whole of the letter of the 23th February, with the exception of the postscript which referred to alleged previous instances of abusive expressions applied by the complainant to respectable natives in his Court.

At the trial of the case before Petheram, C. J., and a Jury, the defendant admitted having written and published the matter complained of, but pleaded not guilty, and also relied upon the first, eighth, and ninth exceptions to S. 499 of the Penal Code. The prosecution gave evidence suggesting the inference that, in making the charges contained in the alleged libel, the defendant was actuated by express malice. This evidence consisted of, (1) decisions passed by the complainant in cases in which the defendant was more or less directly interested, (2) a judgment in which the complainant commented in severe terms upon the defendant's conduct and demeanour in Court, and (3) a letter written by the defendant to the Registrar of the High Court, in which he imputed dishonestly to the complainant in the conduct of a particular case.

The complainant was the first witness called by the prosecution. In cross-examination, Mr. J. D. Gordon, for the defence, asked the following question :—Will you swear that you have never in Court used any offensive expression to any native of this country ?"

Mr. G. E. A. Ross, (with him Babu Dwarka Nath Banarji) for the prosecution, objected to this question. He submitted that particular instances of abusive expressions used by the complainant on former occasions were not relevant under S. 138 of the Evidence Act ; and that, assuming questions

relating to such instances to be admissible as being directed to *shaking* the credit of the witness, under S. 146, it would not, under S. 153 be open to the defence to give evidence contradicting his statements.

Petheram, C. J.—We are not trying the defendant for telling a falsehood, but for defaming the complainant in his character as a Judge. Upon this issue I am of opinion that the whole of the complainant's character as a Judge is relevant.

The first witness called by the defence was Mr. E. G. Mann, who deposed to having practised for some time as a pleader in the complainant's Court at Mussoorie.

Mr. Gordon.—Have you ever heard the complainant use abusive language in Court to natives who had to appear before him?

Mr. Ross.—I object to the question. The charge as laid and to which the inquiry should be confined, is a charge of particular acts of misconduct alleged to have been committed at a specified time and place towards a specified individual. Upon this issue, instances of other acts committed at other times and towards other persons are not admissible in evidence either as facts in issue or as relevant facts. They do not fall within the definition of "facts in issue" given in S. 3 of the Evidence Act, because the general conduct of Mr. Laidman in Court is not in issue, and the truth of the specific charge as to the complainant's conduct in Court on the 9th February does not "necessarily follow" from anything he may have done upon other occasions. Nor do they come within any of the provision of Ss. 6—14 of the Evidence Act, showing what facts are relevant; and hence there is no section in the Act which warrants the introduction of the evidence. Under S. 5, therefore, it is inadmissible.

Petheram, C. J.—The question is, whether the defendant's letter of the 25th February defamed the complainant or not. The prosecution have gone into the past relations of the parties to show that the defendant acted with a malicious intention. Mr. Gordon now seeks to show that Mr. Laidman as a Judge, has no character to be defamed. This is a fact in issue. A statement which is defamatory of one person is not necessarily defamatory of another. The defendant is not being tried for telling a falsehood, but for filching a man's character. Upon this question it is necessary to consider what the complainant's character is.

Mr. Ross.—Assuming that a man's character is bad, that cannot justify another in making false statements concerning him.

Petheram, C. J.—If this were a civil action, the case might be different. But here you put the law in motion against a man whom you accuse of committing a crime, and with a view to his punishment.

Mr. Ross.—The case of a civil action is closely analogous. In such an action, evidence of particular facts tending to show the plaintiff's misconduct might possibly be admissible in reduction of damages, but not to support a plea of justification. For the latter purpose, there is not a single precedent or provision of the law which warrants the admission of such facts in evidence. The case of *Scott v. Sampson*, L. R. 8 Q. B. D. 491, and in particular the judgment of Cave, J., who fully reviewed the authorities on the subject, supports this contention. The grounds of the rule there laid down are, that statements of this description are so vague and general that to admit evidence upon them would be, in effect, "to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life," and "would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses

has been damaged by the defamatory matter complained of." These grounds are equally applicable to criminal proceedings, which, therefore, should be governed by the same rule; and hence it follows that evidence of this description, even assuming it to be admissible in mitigation of punishment, is not admissible for the purpose of justification.

Petheram, C. J.—In that case there was no attempt on the part of the prosecution to prove express malice. In this case you charge express malice, and then seek to confine the inquiry to a particular part of the document, though the question is whether the defendant acted maliciously, and whether the document *as a whole* is true. If in *Scott v. Sampson*, L. R., 8 Q. B. D. 491, the general character of the plaintiff had been attacked, I should think that the defence would have been entitled to give evidence adverse to his general character. The libel there charged a theatrical critic with abusing his position by attempting to extort money, and it was held that this charge could not be justified by showing that he had abused his position in other ways. All that the Court really decided was that if, for example, a libel charged a man with having been drunk on a particular occasion, it could not be justified by evidence showing that on other occasions he had committed theft. There is nothing in the reports to exclude evidence of particular instances of the same kind of misconduct as that alleged in the libel. In the present case this document is only a part of the matters put before the jury to support the charge of malice, and which do prove malice if they are not contradicted. You virtually claim that the prosecution may go into these general matters, but that the defence may only contradict you as to a part. The case of *Lawson v. Labouchere*, not reported, appears to me to be more in point than *Scott v. Sampson*, L. R. 8 Q. B. D. 491. In that case the complainant was cross-examined at great length upon his conduct as a journalist, and in order to contradict him files of the *Daily Telegraph* for some years back were put in. Apart from this, however, I am of opinion that, in the present case, Mr. Laidman's character is a fact in issue.

Mr. Ross.—It is in issue, not generally, but with reference only to particular expressions said to have been used on a particular occasion. This is shown by the complaint filed by the prosecution, and by the charge framed by the committing Magistrate. The prosecution has not been instituted in respect of every allegation contained in the defendant's letter of the 25th February, but only in respect of such the allegations as are sufficiently specific to admit of an answer. It was necessary to put in the whole documents, but the defendant has not been required to plead to any points other than the statements relating to the 9th February and to the adjournments. The other imputations were not made the subject of charge, because they are so indefinite and general, specifying neither time, place, nor person, that it was impossible to bring evidence regarding them or to meet them in any way. Any evidence therefore upon these allegations must necessarily take the complainant by surprise, and subject him to great hardship.

Petheram, C. J.—If the complainant had chosen to taken civil proceedings, the difficulty would have been avoided. Not having done so, he must take consequences.

Mr. Ross.—The rules of the service practically made such a course impossible. The official reputation of a civil servant is considered as being in the hands of his superiors, and the complainant was bound, as a matter of fact, to take only such action as they approved. The learned Counsel referred to the *Manual of Government Orders, North Western Provinces*, Vol. I, p. 156, (Judicial Criminal):—"All officers must obtain the authorization of Government before having recourse to the Courts for vindication of their public acts or their character as public



functionaries from defamatory attacks. This order does not effect an officer's right to defend his private dealings or behaviour in any way that may seem to him fit; but his official reputation is in the charge of the Government which he serves."

Petheram, C. J.—That rule does not appear to me to apply to charges of this kind, but to charges relating to a man's competency in his work, and to the fairness of his decisions. In using offensive expressions from the Bench, a man does not, in my opinion, act in his "official" character, but out of his own folly. I regard the matter as a vulgar little quarrel, and as having nothing of the character of a state trial about it.

M. Ross.—It is not merely a prosecution brought by a private person, but a prosecution brought by a public official to vindicate his character. For this purpose he is entitled to use the remedy provided by law.

Petheram, C. J.—I shall tell the jury that he cannot use a criminal prosecution for that purpose. The object of such proceedings is not to seek a remedy for an individual injury, but to punish a crime, and the complainant is only interested, like any other member of the public, in seeing that justice is done. With reference to the alleged hardship caused to the complainant, it will be for the jury to consider whether he has been so taken by surprise that they should regard the evidence with suspicion.

Mr. Ross asked that the point might be reserved under the Charter for decision by the Full Court.

Mr. Gordon, for the defence, was not called on to reply.

Petheram, C. J.—The whole question which has been raised by this objection turns upon the construction to be placed upon the language of S. 499 of the Penal Code. That section creates the criminal offence of defamation, and whoever is guilty of the offence as therein defined, is liable to punishment in the public interests. The question of guilt is for the jury to consider, who must have before them all the evidence, and who must consider it without reference to the interests of any other person than the public and the prisoner. The words of S. 499 are as follows :—"Whoever, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing, or having reason to believe, that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

The question here is whether, with reference to these words alone, and apart from the rest of the section, Captain Hearsey intended to harm the reputation of Mr. Laidman. Before this question can be answered, it is essential to see what Mr. Laidman's reputation is, and, moreover, Mr. Ross puts the case for the prosecution on the ground that Captain Hearsey acted with a malicious intention to injure the complainant by telling a falsehood, and not with a genuine intention to furnish proper information to the public. Upon this issue, it must be material to ascertain whether Captain Hearsey, in his letter *as a whole*, was telling the truth or not. For these reasons I rule that this evidence is admissible, that is to say, first, because it relates to the question what is the reputation which the defendant is said to have harmed; and secondly, because it must be gathered from the document *as a whole* whether it shows a malicious intention or not. I decline to reserve the point for the Full Court, being of opinion that to do so would not serve the interests of either party.



## CHAPTER 61

## In Case of Drowning

In case of drowning, it is very difficult to find out whether it was due to accident suicide or homicide. Some tests have been laid down below but they do not establish the point conclusively.

## Death from Causes Connected with Drowning

A person may have been stunned by the fall into the water or even may have been actually killed by this means, or by his body striking some solid object in its fall. Taylor's Med. Jur. 1928, Vol. II, p. 630. He may have been so intoxicated (or otherwise rendered insensible) as to have been unable to help him. The fright at finding himself in dangerous position may have caused such a shock as to have actually killed him by sudden stoppage of the heart, especially if this organ were weak or definitely diseased. The shock from sudden application of cold to the skin may equally have caused sudden stoppage of the heart or rapid internal congestion of organs incompatible with continued circulation. Cramp in the muscles of the limbs may have prevented a struggle for life. Such cramp may have spread rapidly to or even started in the glottis or the respiratory muscles. He may have died from some totally independent cause, such as apoplexy, fits, epileptic or otherwise, etc., and his position at the moment of death may have been such as to fall into the water. He may have been killed and thrown in. *Ibid.* p. 631. The sub-pleural hæmorrhages (petechiæ) noticed under the heading of asphyxia are seldom observed in drowning, but when present they offer strong corroborative evidence of this form of death. Taylor's Med. Jur. 1928, Vol. I, p. 638.

In examining the abdomen, it will commonly be found that the stomach contains water, which appears to enter into this organ by the act of swallowing during the struggle for life. In some instances no water whatever is found in the stomach. The absence of water may probably indicate a rapid death, in which there has been no power to swallow. *Ibid.* p. 639.

(a) On opening the head, the brain displays a darker colour than usual. (b) There is an unusual accumulation of black blood in the pulmonary arteries and veins. The left ventricle is only half filled with the same kind of blood, sometimes completely empty. (c) Some water mixed with frothy matter, and occasionally coloured with blood, is found in the trachea. (d) Little or no water is found in the stomach; and when it is present, it can in no way have contributed to death. There is even less chance of water being found in his organ, if the body have been thrown into the water after death. Ryan's Med. Jur. 1836, pp 348-349.

One minute and a half complete submersion is fatal, provided that ordinary respiratory efforts are made while submersion is complete. Taylor's Med. Jur. 1928, Vol. I, p. 632. If respiratory efforts (by which water or air and water enter the mouth) are completely suspended, simple deprivation of air for as much as four minutes need not be fatal. *Ibid.* p. 632. For as air escapes from the lungs, water penetrates into the minute air-tubes, and so no air can enter to supply the place of that which has already expended its oxygen on the blood. Hence this fluid must circulate, in the first few minutes after submersion, in a state unfitted for the continued support of life (unaerated); but the person lives, and is for a short time after immersion susceptible of recovery. *Ibid.* p. 629. If materials are found grasped within the hands of the deceased which have evidently been torn from the banks of a canal or river, or from the bottom of the water in which the body is found, we have strong presumptive evidence that the person died in the water. Taylor's Med. Jur. 1928, Vol. I, p. 640. When a dead

body is thrown into the water, and has remained there some time, water, fine particles of sand, mud, weeds, etc., may pass through the windpipe into the large air-tubes. Water in these circumstances, however, does not penetrate into the substance of the lungs as by aspiration during life. *Ibid*, p. 642. The general impression among non-medical persons appears to be that, whether in drowning or suffocation, there ought to be some particular visible change in some parts of the body to indicate at once the kind of death; but this notion is founded on false premises. *Ibid*, p. 643. It may be thus summarised, if, after careful and complete examination, water (and things in the water of the locality) is found aspirated into the lungs, death was certainly due to drowning. *Ibid*, p. 644.

If there is no evidence of aspiration of water the person was not drowned, but died from something else which it may or may not be within the reach of evidence to determine. *Ibid*, p. 644. The absence of water from the stomach cannot, however, lead to the inference that the person had not died from drowning because in some instances the victim may be deeply unconscious and unable to swallow. *Ibid*, p. 644. That a large quantity of water of the same nature as that in which the body is found is strong presumptive evidence of immersion during conscious life, and therefore of death from drowning. *Ibid*, p. 645.

That small quantities give no very certain indication unless the inspection is made very shortly after death. *Ibid*, p. 645.

That the quality, *i.e.*, dissolved or suspended matter is of much more importance than the quantity. *Ibid*, p. 645.

Dead bodies taken out of wells often present considerable marks of violence when the deceased persons have fallen in accidentally, or have thrown themselves in intentionally. The presence of these marks must not create a hasty suspicion of murder. Taylor's Med. Jur. 1928, Vol. I, p. 649, Lyon's Med. Jur. 1935, p. 321. Fractures of bones may be accidental, as in diving into shallow water with a hard supporting basis. *Ibid*, p. 650.

The violence inflicted by fishes, rats, mulluses, etc., on a body in the water is generally fairly easy to distinguish. The edges of the raw surface are more eroded than ragged or sloughy there may be the actual marks of the teeth, or possibly even shell-fish *in situ*. *Ibid*, p. 651. If the marks of ligatures bear the evidence of violent constriction, especially on both wrists, or on the fore part of the neck, the presumption of murder becomes strong. *Ibid*, p. 653.

The supposed external signs of death by drowning are very deceptive, and, if they prove anything, they prove only that the body has been a longer or shorter time in the water. Criminal Investigation, Third Edition, p. 437.

Again, the lowering of the temperature supposed to be observed on the corpses of drowned persons proves nothing. *Ibid*, p. 437.

As to the extreme paleness which is said to be a characteristic sign of drowning, it has certainly been occasionally noted by experts, but most frequently it is non-existent. Also it is often found in corpses where death has been caused from quite different causes, hence this proves nothing. *Ibid*, p. 437. Perhaps the strongest piece of evidence is the great contraction of the penis, or in the case of a woman of the breast nipples. When this is found it must be admitted that the person has entered the water while yet alive or perhaps immediately after death. *Ibid*, p. 438. A withered umbilical cord, which the water cannot soften, leads to the conclusion that the body of the infant has been exposed to the air several days before being placed in the water; in water or damp earth the umbilical cord decays but does not dry up. *Ibid*, p. 438. It is so common as to be considered an almost certain test of suicide, that a Hindu woman before throwing herself into the water, draws her cloth tightly between the legs and fastens it firmly at the waist so as to prevent any indecent exposure

of the person on discovery of her body. The same feeling renders it most improbable that a woman committing suicide in the manner suggested in the next paragraph would divest herself of her clothing. *Ibid*, p. 435.

It is impossible to decide whether a person has fallen into the water by accident, or, has thrown himself in, or is the victim of homicide. Ryan's Med. Jur. 1836, pp. 319-354. Whether death is due to asphyxia from the entry of water into the air passages or to spasm of the glottis, water will generally be found in the stomach. Lyon's Med. Jur. 1935, p. 320. It is highly improbable that after death water can enter the stomach, hence the presence of this *post-mortem* appearance indicates that death was due to drowning. *Ibid*, p. 320.

To be of value as an indication of drowning the water must resemble in character that from which the body was recovered. *Ibid*, p. 320. If the body has been thrown into the water after death there is little or no chance of the water being found in the stomach. Absence of frothy mucus is not a conclusive proof that the body was dead before submersion. Buoyancy of human body is another factor which determines whether the body found in the water was drowned or thrown in after death. If the body has been drowned while living the following will be the appearance when taken out of the water:—The whole body is cold and pallid; the face especially the eyes are half open and the pupils much dilated; the mouth and nostrils contain a good deal of frothy fluid; the tongue is protruded between the teeth and approaches to the under edge of the lips. Ryan's Med. Jur. 1836 pp. 349-354.

There is always a possibility when a boy of 12 gets drowned in a tank that there has been an accident, but previous attempts to kill the boy are admissible to rebut the suggestion of accidental drowning. 1940 B. 365=42 Cr. L. J. 111. Where a woman is charged for causing death of her new born child by drowning it in a cesspool, it must be proved that the body found is the body of her child. The fact that she was in advanced state of pregnancy and was recently delivered is not sufficient. 1941 M. 1=42 Cr. L. J. 677. Mud in the nails indicates struggle in the water by the deceased during life and is presumptive evidence in favour of death by drowning. But this presumption is not absolute in India where people go about bare feet. 1941 M. 238. In a charge of throwing the child in the water with intent to drown it must be shown that accused had the will and intention. 15 Cox. C. C. 143 See 1940 A. 486.

## CHAPTER 62

### In Case of Murder by Firearm

**Gun-fire** :—A number of murders are committed by gunshot firing and a lawyer is often called upon to cross-examine with regard to the kind of firearm used, the direction from which it was fired, the distance of the firearm discharged, when was the fire-arm discharged, whether it was dangerous to life and whether it was due to accident, suicide or homicide.

Considering the importance of the subject, it is advisable to set the law on the above points at length, so that reader may have comprehensive knowledge of the subject while cross-examining an expert in firearms.

**Accidental** :—The accidental discharge of firearm may result in the wounding of the person holding the weapon or of some individual. In the first case the wound will be on the front of the body, and will often be from below upwards, as the weapon is generally discharged while it is being examined, when the muzzle is probably pointing upwards. Lyon's Med. Jur., 1935, p. 234. In connection with such accidental wounds the characteristics of a close discharge

will be found. If an individual other than one handling the gun is wounded, it will not be possible to distinguish the injury from a deliberately inflicted one. In cheap revolvers, gas escapes at the time of discharge. This gas, carrying with it unconsumed powder, will stain the hand holding the weapon. Blacking of the hand is proof of suicide or of accident. *Ibid.*

**Diagnosis of:**—Gunshot wounds resemble contused and lacerated wounds. If the wound is single, it may have been caused by a firearm loaded with powder and wadding only, if the weapon has been discharged near the body. Two orifices caused by the same discharge, indicate the employment of a hard projectile. When two orifices are present, the orifice of entry will usually be found to be smaller and more depressed than that of exit, which latter is usually ragged and everted. More than two orifices may be caused by one projectile, *e. g.*, when this has entered the body after traversing a limb or has split up against a sharp ridge of bone into two pieces, each finding a separate exit, or it may be caused by an intact bullet and a splinter of bone punched off by it. Lyon's Med. Jur., 1904, pp. 120-121. If only a superficial bruise or abrasion be found it is impossible to say positively that a firearm caused it, but grooved appearance in the skin and holes in the clothes may give some idea. If the missile is found in the body it is conclusive evidence of the nature of wound. *Ibid.* If the missile is found not in the body, but in the room, this is a piece of very strong circumstantial evidence to be weighed with the character of wound. The aperture of entrance is round only when the bullet strikes point blank, or nearly so; if it should strike obliquely, the orifice will have more or less of an oval or valvular form. If the projectile traverses a bone the direction of fire may be ascertained from the difference in the margin of wounds of entrance and exit. Bone always tends to bevel at the point of exit. The entrance would show as a single lacerated hole about the diameter of the gun barrel, and surrounded by a zone of blackening or burning if discharged within a short distance. Taylor's Med. Jur., 1928, Vol. I, pp. 510-511. With a small crushing force it naturally follows that the lower its velocity and power, the larger the wound, because the elasticity of the skin and other tissue has more time and opportunity to come into play with consequent greater tearing. It is the same with the aperture in the dress when this is formed of elastic material. *Ibid.*, p. 512. When an automatic pistol or revolver is fired with the muzzle touching the skin, the gases pass into the wound and lacerate the tissue by their expansion. This causes the wound of entrance to enlarge than the exit wound. *Ibid.*, p. 513.

The chances of two different bolts making identically the same marks are too remote as to be to all intents and purposes non-existent. 1936 Pesh. 152.

**Direction from which the firearm was fired:**—A missile fired from a firearm has a tendency to continue in straight line from the point of entrance to the point of lodgment, or to the wound of exit, so that, if the internal wound be straight this straight line proves accurately the direction in which the barrel of the weapon was pointed when fired. But sometimes it is not straight, but curved, on account of slight obstacles, such as bones, etc. The position of the wound of entrance marks the part of the body which was at the moment of discharge nearest to the muzzle of the weapon, or rather in a straight line, with the muzzle. It therefore indicates with mathematical precision whether the victim was facing the muzzle or with his back or side to it. If we can discover two fixed points where a ball has touched a building without being deflected, it will be easy to determine the direction. Taylor's Med. Jur., 1928, pp. 522-523. The deflection of projectiles may occur not merely when they come in contact with bones, but when they meet skin, muscles, tendons, or membranes. A ball which entered at the ankle has been known to make its exit at knee and another entering the shoulder was found below the right ear. *Ibid.*, p. 524. When a shot is fired at a person

through pane of glass the person firing must be in the same straight line when it is produced by joining the two points, *viz*, of the window pane and that where the victim was standing, unless it can be shown that the assailant was on horse back. (Criminal Investigation by Dr Hans Gross, 1934 Ed., p. 291. Bullet marks or shot holes, by their situation, may indicate the position of the assailant at the time the weapon was discharged. Lyon's Med. Jur., 1935, p. 237.

**Distance of the firearm discharged.** If the muzzle of the weapon were in direct contact, the skin besides being burnt, is torn, and much lacerated. The bleeding is usually slight, and when it occurs it is more commonly observed from the orifice of exit than from that of entrance. Taylor's Med. Jur. 1928, Vol. I, p. 511; Lyon's Med. Jur. 1904, p. 120 Lyon's Med. Jur. 1935, p. 241. If the distance from which the gun is fired is within 12 inches, the wound will, as a rule, be single, while beyond this each shot will make a separate wound. (See Casper, I, 26.) But it will also depend on the charge, size of shot, bore of weapon and whether choke or cylinder. Lyon's Med. Jur., 1904, p. 121. In the case of shot guns, the distance from which the weapon was fired may be deduced from the amount of scattering of the charge. At about a yard the whole of the charge enters in a mass, producing a round hole about the size of the bore of the weapon, with ragged edges and surrounded by a zone of blackening and burning. As a rule there is little trace of burning beyond a yard, but traces of powder marks may be found up to four yards or more. Taylor's Med. Jur., 1928, Vol. I, p. 516.

The shot begins to disperse in an ordinary cylindrical gun at about three yards, at which distance the bulk of the shot enters in one mass and leaves a hole with a few isolated shot around it. The dispersion gradually increases, and at about five yards an open pattern about ten inches in diameter is found. *Ibid*, p. 516. At ten yards the diameter of spread is about twenty inches, at twenty yards about thirty inches and so on. With fully choked barrels the dispersion is about half the above. With pistol loaded with shot the dispersion is very much greater. *Ibid*, p. 516. Dispersion varies to a certain extent with different weapons, and to a great extent with the nature and quality of the powder, and the manner of filling or loading. *Ibid*, p. 516. It is out of the power of a witness to say from the mere fact of a bullet lodging or traversing whether the assassin was far off or near at the time the deceased was wounded. *Ibid*, p. 517. A single bullet fired from four to six yards from the person has been known to produce an extensive wound. *Ibid*, pp. 517-518. A discharge of small shot, in contact with the skin or close to it, generally produces not a round opening, but a severe lacerated wound. *Ibid*, p. 518. It is unusual to get marks of burning beyond a yard or a yard and a half with a shot gun, or at more than half a yard with a revolver. There are but slight signs of burning with automatic pistols, even at a few inches, for the charge of powder is very light, and it is completely exploded. The lighter the projectile, the shorter the distance to which it is carried, but when discharged near the body, it may produce penetrating fatal wound. *Ibid*, p. 519. If there are marks of powder or burning and the automatic pistol was not much more than a foot away when fired; if there are no marks it is impossible to tell how far off it was. *Ibid*, p. 522. No general rules regarding distance can be laid down. Experiments must be done with the weapon and with cartridges (or loading) similar to those which are alleged to have been used. *Ibid*, p. 522.

As distance increases, the traces of smoke, tattooing and burning disperse over an increased area and finally disappear altogether. All may be found up to ranges of 6 inches and at ranges beyond 3 feet very little if any, trace of powder can be observed. Automatic pistols as a rule fire cartridge loaded with less powder than those fired from revolvers and therefore produce

less discolouration. Criminal Investigation by Dr. Hans Gross, Ed. 1934, p. 424.

With professionally loaded cartridges and smokeless powder a single wound occurs up to a range of about one yard, but the burning, blackening and tattooing is far more intense than ever is to be found with a wound from a rifle, revolver or pistol, and the single wound has irregular, ragged edges. *Ibid.* At any range beyond a foot, traces of individual holes made by separate shots are likely to be found. A bullet usually takes a straight line between entrance and exit and from this the line of fire can be deduced. Shots discharged at short range may produce a wound similar to that made by bullet, because the shot on quitting the barrel remains packed, separating only later to form what is called the cone of dispersion. *Ibid.*, pp. 425-426. The distance at which the shot was fired is usually related to the question of premeditation as it is manifest that a shot fired from a considerable distance could not have been fired in the heat of sudden quarrel. Lyon's Med. Jur., 1935, p. 237. If the gun is fired at a right angle to the body the burn covers an area circular in shape and about 6 inches in diameter. If the burnt area be oval in shape the indication is that the barrel of the gun was inclined to the surface. Lyon's Med. Jur., 1935, p. 242. In the case of entry of gas in the wound or of burning of the skin, it is safe to say that the injury must have been caused by a shot fired within an inch or two of the body. *Ibid.*, p. 244. A shot of cartridge about No. 6 in size fired at a distance of 6 paces is very likely to cause death. The accused is guilty under S. 307, I. P. C. 10 Cr. L. J., 57 : 9 C. L. J. 432.

### Kinds of firearms and use

**Guns including rifles.**—Guns may be classified from several points of view : single, double, or more barrelled muzzle or breach loaders—rifles or shotgun. Shot includes all projectiles in the form of small balls, loaded into the barrel not singly but in quantities, and not compressed but simply retained by the wad. While bullets are cast in moulds, shot is obtained by allowing molten lead to fall through a sieve, from a sufficient height into the water. To render the lead more liquid from  $\frac{1}{2}$ rd to  $\frac{1}{3}$  per cent of arsenic is generally added. This details is important specially when the shot has remained sometime in the body. Shot is generally manufactured according to numbers, each number indicating a special size. They are distinguished by the number of pellets per ounce weight. The table on the next page may be accepted as a fair standard.

*Table giving the number of shots in one ounce of Newcastle, chilled or soft shot.*

Sizes.	SSG	AAA	AA	A	BBB	BB	B	1	2	3	4	5	6	7	8	9
10	12															
Pellets ounce.	11	40	48	36	64	76	88	104	122	140	172	218	270	340	450	
580	850	1250														

Criminal Investigation by Dr. Hans Gross, Ed. 1934, p. 273.

Modern *Airgun* will fire a bullet up to 22 with accuracy up to ranges of at least fifty yards and that serious damages can be done at considerable longer ranges. If a *muzzle loading percussion gun* has been used we must in making search look out for accessories peculiar to this weapon, e. g., ramrod plug, wads, shot bags powder-horns, and such like which belong to a muzzle loader. In *Breach loading shot guns* there are three systems of percussion—pinfire, rimfire, central fire. In pinfire, a pin passes through the cartridge perpendicular to the axis, the hammer falls on the pin, which causes the cap to explode. Rimfire is unknown in common use. Central fire cartridges are now universally

employed. When it becomes necessary to distinguish between shots fired from a muzzle loading rifle and a breach loading rifle, we must remember the way in which muzzle loaders are charged. The powder is first poured down the barrel, the mouth of the barrel is then covered with a well-greased piece of cloth, called a "patch" on which the bullet is placed, pressed down and finally rammed home. Hence only certain projectiles can be used. A round bullet is almost certain mark of a muzzle loader. Marks are also left by the patch, but this happens on the contrary when the bullet fits very tightly. *Ibid*, pp. 276—281.

**Pistols.** In all pistol shooting the shooter looks at the object aimed at and not at the pistol. *Ibid*, p. 284.

**Revolver.** A service revolver, firing a .455 calibre soft lead bullet, will stop any body if it hits anywhere. Very compact weapons of .38 calibre or less will not seriously disable unless a vital spot is hit. Although shots from a revolver or pistol can be effective at long ranges, the weapons are ordinarily used only at close quarters. There are many varieties of country made revolvers in India from which shots can be fired. *Ibid*, pp. 285-286.

**Marks on dress and size of shots.**—It is possible to find large gun shot wounds while the dress covering them is not in the slightest degree injured. Dr. Bick says that he found a deep wound in the arm with fracture of the humerus without any corresponding hole in either the cloak or tunic. Criminal Investigation by Dr. Hans Gross, Ed. 1934, p. 429. At very close ranges there may not be much difference in the appearance of wounds caused by shots of various sizes; the smaller the shot the more minutely irregular edges are likely to be. Small shot will usually lodge in the body, large ones are likely to pass through and to make exit wounds, if fired from close range. The shot most commonly responsible for injuries here are of size SG, BB, Nos. 4 and 6. Lyon's Med. Jur., pp. 244-245.

**When was the firearm discharged.**—For a few hours there is a smell of hydrogen sulphide, and on chemical examination of fouling, a reaction for sulphides will be obtained for five or six hours. Sulphates are found only in traces for the first few days, then they gradually increase. Iron salts in the ferrous state are usually found in traces in the early stages, and gradually become converted into ferric salts. Taylor's Med. Jur., 1928, Vol. I, p. 544.

Recently discharged firearms will be found blackened inside the barrel, from the residue left by the gun powder after ignition. This residue consists mainly of finely divided carbon and potassium sulphide, and yields to water a dark-coloured liquid, alkeline in reaction, and which, after filtration, strikes a black colour with a solution of a bad salt. After a time the potassium sulphide becomes oxidised into potassium sulphate. Again the weapon alleged to have been used may show signs of recent fracture, or be bent, or otherwise injured as a result of its use. Lyon's Med. Jur., 1904, p. 127.

**When was it inflicted.**—A gunshot wound undergoes no marked change for an hour or so after its infliction. Taylor's Med. Jur., 1928, p. 513. If the wound be something over ten or twelve hours in age, its age must be judged by the amount of swelling, sloughing, suppuration, etc., for it becomes then merely a bruised, probably septic, wound. *Ibid*, p. 513.

**Whether dangerous to life.**—Gunshot wounds are dangerous to life, first from shock; secondly from laceration of a large blood vessel or important viscus, such as heart, brain, liver, etc., and thirdly, being contused wounds, the tissues are killed and consequently slough, with danger of haemorrhage or septicaemia, etc. So long as the missile still remains in the body danger



exists. Instances of gunshot wounds proving fatal after a year and a day are not infrequent, and they show the inconsistency of limiting the legal responsibility of an assailant by the period at which death takes place. Taylor's Med. Jur. 1928 pp. 515-516.

Fatal wounds may be caused by gun powder and wadding alone if fired within about four inches from the body. Lyon's Med. Jur., 1904, p. 121. A single pellet of shot may cause death by penetrating the aorta or the brain through the eye. *Ibid.* The question as to how long did the victim survive can be answered by (a) nature of the wound, (b) the organ wounded, (c) the state of the wound as regards suppuration, gangrene, healing, etc., (d) the amount of blood lost. Taylor's Med. Jur., 1928, p. 513.

**Whether due to accident, suicide or homicide.**—The evidence to determine this question may be detailed (a) from the situation of the wounds; (b) from the design, (c) from the proximity of the weapon on discharge; (d) from the position of weapon when found after death; (e) from the direction of the wound, (f) from the nature of the projectile, wadding, etc. Taylor's Med. Jur., 1928, Vol. I, p. 528 to p. 542.

**Whether one bullet can cause more wounds.**—One ball may sometimes produce several wounds on the body and then there will be only one orifice of entrance, but owing to the ball splitting within the body and dividing itself into three or four pieces, there may be several orifices of exit. This splitting of a ball has repeatedly occurred when the projectile in its course has encountered an angular surface, or a projecting ridge of bone. Taylor's Med. Jur. 1928, p. 525.

**Whether shots can be fired from pistol and revolver:**—That many strange varieties of country-made revolvers exist in India is certain. Criminal Investigation by Dr. Hans Gross, Ed. 1934, p. 286. In a recent case a number of eye witnesses testified that the accused had shot the deceased several times with a revolver and made off. Four shots were fired and in three of these a round bullet being used and in the fourth small shot. The bullets were weighed and expert evidence was given that they could not have been fired from any known revolver. Indeed 12 bore gun would have been required to take them. On the other side a Police Officer gave evidence that he had seen the country-made revolver which he thought might be of sufficient calibre to take such a bullet. The appeal was adjourned by the High Court, and such a weapon was produced. It was a muzzle load having four short barrells welded together. All four were rotated by hand, bringing a cap under the hammer. The conviction was upheld. (By Madras High Court). At the same time a two-barrelled muzzle loading revolver of larger calibre was found in which the barrels had been bored through one rectangular piece of metal. This case exemplifies the danger of accepting dogmatic statements from experts of the layman variety. *Ibid.*, p. 286. Naturally when we find shot we suppose it has been fired from a shot gun and when we find a bullet we conclude that it has been fired from a rifle of corresponding calibre and rifling but we must not forget that the fact may be quite otherwise, and above all we must not dismiss legitimate suspicion on the sole ground that "the projectile does not fit the gun." Criminal Investigation by Dr. Hans Gross, Ed. 1934, p. 275.

**Self inflicted gun shot:**—The most convenient site for a self-inflicted gunshot wound is the temple of the same side as the hand used in shooting. Less commonly the heart region is selected. If the weapon is a long one, such as gun or rifle, the muzzle may be placed in the mouth or under the chin. Wounds situated elsewhere, if accident can be excluded, are homicidal. In cases of accidental discharge of the firearm, the wound will be for the front of the body, and



will often be from below upwards...Blackening of the hand with unconsumed powder is a proof of suicide or of accident. Lyon's Med. Jur., 1935, p 234. Self-inflicted gunshot wounds will be found to involve non-vital parts, except in cases of attempted suicide. They will be near wounds. The skin will be more or less lacerated and bruised. There will be much ecchymosis and the hand holding the weapon, as well as the dress and the wounded skin may be blackened or burnt by the exploded gun powder. Taylor's Med. Jur., 1928, p. 544.

**Death by gunshot Evidence:**—A Sessions Judge found that shortly after murder Nand Lal were found at the spot each with a gun in his hand and that either of them fired the shot. Held, accused should be acquitted when there is no evidence of common intention. 11 C. W. N. 1085. When several shots are fired but there was only one wound, all are guilty of murder. 1925 P. C. I. But if two persons suddenly came on the scene to prevent the complainant from carrying away an article and fire shots, common intention is not proved. 1945 P. C. 118. The fact that bullet found inside the body was fired from the revolver recovered at the information of the accused is not sufficient for conviction. 1943 L. 56=44 Cr. L. J 397. Deceased implicated accused in two or three dying declarations, and a freshly fired gun was recovered from him. Held, he was guilty. 1940 Pesh. 49. For these cases See Prem's Criminal Practice 1947 Ed.

### Attempt to murder by firearm.

Sometimes intricate questions of law and facts arise in case of discharge of firearm. Whether gun-firing amounts to an attempt to murder, the following cases will illustrate the point:—

A shot of cartridge about No. 6 in size fired at a distance of 6 paces is very likely to cause death; the accused is guilty under S. 307. 10 Cr. L. J. 57: If a person fires two successive shots towards the same man, an intention to murder is proved. 1 P. W. R. 1910 Cr., 5 I. C. 602 : 11 Cr. L. J. 125. Using revolver at night to keep watch is not offence, when it was not aimed at any one. 9 L. L. J. 331 : 1927 L. 853. A Police sowar fired three successive shots while pursuing a person. One of the shots struck a person bathing in the river, no offence under S. 307, I. P. C., is established. 1923 L. 415 : 76 I. C. 1028 : 25 Cr. L. J. 303. Accused pulled the trigger twice with no result. In the absence of proof that gun was loaded, there is no offence under S. 307 but under S. 352, 1923 R. 251 : I. R. 209.

Intentionally discharging loaded gun from a short distance, causing injuries, which might prove fatal is an offence under S. 307. 29 I. C. 670 : 16 Cr. L. J. 542.

If the gun failed to discharge due to the omission of the assailant to cap the nipple, the conviction for attempt to murder does not lie. 4 B. H. C. R. 17. A shot was fired from the house in which accused was residing but it was not aimed at anybody. It was not proved that accused fired the shot, he is not guilty. 1927 L. 853 : 9 L. L. J. 331.

If the intention of the accused in firing a shot at a Police Officer was not to kill him, but to scare him away, he is guilty under S. 307, I. P. C. 1931 M. W. N. 861. The accused fired two shots from a powerful revolver at point blank range at His Excellency the Governor of Bombay. He missed his aim and no injury was caused. Held, he was guilty under S. 307. 1928 B. 279 : 34 Bom. L. R. 571, 14 A. 38 *approved*, 4 B. H. C. R. 17 (Cr. C.) *doubted*. Accused, a soldier, fired at his grandmother during a quarrel and the bullet hit fleshy part causing simple injuries. Held, he was guilty under S. 324 and not under S. 307. 1933 L. 315 : 145 I. C. 702.

Accused fired his pistol at a constable who was chasing him. The bullet struck him on his side. Held, he was guilty under S. 307, I. P. C. and S. 19 (f) Arms Act. 1933 L. 852.

Accused shooting at A but wounding B by mistake is guilty under S. 307, having regard to the provisions of S. 301, 1935 Pesh. 74.

Accused who was drunk fired three shots at a girl. Held guilty under S. 326 and not under S. 307. 1937 C. 432. Accused purposely aimed his gun and wounded another, when gun went off. Conviction under S. 307-326 is illegal. 1937 S. 11=38 Cr. L. J. 487. When a pistol is presented at a range to which the ball cannot by any possibility carry, it is not assault. *See Halsbury Vol. 9 p. 470 para 502.* A who was pursued as a thief by B fired at B and wounded him in the right leg. Held, guilty under S. 307 because if death had occurred the case could have fallen under S. 300 *fourthly*. 1944 S. 83.

### Illustration

(i) Three accused A, B and C were absconders in a murder case. The Police received information that they were hiding in a cotton field. The Sub-Inspector ordered up the Superintendent of Police who along with a *pose* of policemen, *aldars*, *Lambardars* and dozen other persons surrounded the field. The Superintendent of Police ordered a tear gas shell to be fired which was accordingly done. After a while seven shots were fired by the Police. On hearing these shots, the accused fired two shots in succession towards the police party, but immediately after, one of them stood up and raised his hands and said, "we will surrender, don't kill us." On hearing this the Superintendent of Police said that he had any other companion he should also stand up. Two more persons stood up. They were asked to come out of the field with their hands raised and accordingly they came out and were arrested by the Police. On search of the place a gun with bandolier containing 12 cartridges and two discharged cartridges were found. All the accused were sent up on a charge of murder but B and C were acquitted and A was sentenced to death. The Police then prosecuted B and C under S. 307, I. P. C., for attempt to murder the police party and they were sentenced to three years' rigorous imprisonment. On appeal the following points were urged by the author :—(a) that the distance between the accused and the Police was over 110 yards and 12 bore-gun recovered from the place where the accused were hiding could not produce any fatal result at a distance of more than 70 or 80 yards. Hence S. 307 does not apply. (b) that the accused fired two shots from the cotton field while they were sitting. It was argued that a missile fired from a firearm has a tendency to continue in straight line. If the barrel of the gun was pointed straight towards the body of a Police Officer it could not produce fatal result. The cotton stalks were more than six feet high, and the accused fired the shots while sitting. It was necessary that there should be some marks of the shots on the stalks. Moreover there was 110 yards of cotton field between the accused and the Police, hence the shots could never reach them after piercing through the cotton stalks. If the barrel of the gun was slanting upward, the shots would go in the upward direction and could never hit the Police Officers, because an ordinary Police Officer is only 6 feet or so. (c) that it was impossible to find out the direction in which the gun was fired when a person cannot see the smoke of the discharged cartridge especially when shots do not hit any body or object and could not be traced, and there was no clue about the wads. (d) that it was impossible to find out as to who fired the shot.

In this case, tear gas shell was fired and there was so much smoke that a person could not clearly see anything beyond a few feet. The Judge did not fully agree with some of the above points as the material on the file was not sufficient, but acquitted the accused mainly on the ground that it was not possible to find out exactly as to which of the accused fired the gun in the cotton field. The applicability of S. 34, I. P. C., was doubtful as it was possible that A may have fired the gun without any pre-arrangement or pre-consultation with the other accused.

He held that the firing was not done in furtherance of common intention and therefore, acquitted the accused.

(ii) The following illustration may also be noted :—

In this case witness testified to the firing of successive gun shots by the accused.

Counsel (examining a witness): "You say you saw the shots fired?" A. "Yes, Sir."

Q. "How near were you to the scene of the affray?" A. "When the first shot was fired I was about ten feet from the shooter."

Q. "Ten feet. Well now, tell the Court where you were when the second shot was fired?" A. "I didn't measure the distance."

Q. "Speaking approximately, how far should you say?" A. "Well, it approximated to half a mile." 25 M. L. J. 222.

This was impossible.

## CHAPTER 63

### In Murder Cases.

In criminal cases generally and in capital cases particularly, so long as your case stands well ask but few questions. Never ask any question, the answer to which if against you may destroy your client's case, unless you know that if the answer is unfavourable, you are prepared to destroy his testimony. See Paul Brown's Rules.

The sound rule is that the counsel should stop with the victory and should not press the question merely to please his clients or to play to the gallery. It has often happened that unnecessary cross-examination on a certain point has ended in fatal results.

(i) A woman was charged with the murder of her child; she was defended by a then well-known Advocate.

The witnesses for the prosecution, although they proved finding the body of the child in the prisoner's hut, could not establish that the prisoner ever had a child, much less the child in question, and there was practically no evidence against her.

But her counsel anxious to make assurance doubly sure, cross-examined the last (police) witness, so as to gain the jury's sympathy with the prisoner. He asked: "You know the prisoner was badly treated by a young man?"

"Yes, he broke off the engagement when he heard she was a mother."

The damning fact had been brought out by her own counsel, and the prisoner was convicted and subsequently hanged. 20 M. L. J. p. 291.

(ii) In a case of murder a witness was pressed in the following manner with the following result:—In this case the question was, to what sex the deceased belong?

Q. "Do you mean to say you know the deceased by her clothing?" A. "Yes, I know every garment she wore."

Q. "But do you mean to say you know the deceased person was the woman?" A. "Yes."

Q. "How do you know her?" A. "By her features."

Sentence: Death.

(iii) Another piece of cross-examination was in a case where an alibi was set up. The charge was, "murder,"

It was alleged that the prisoner had slept, on the night of the murder, in a cottage a great many miles away from the scene, and that he was in bed by a certain hour.

The tenant of the cottage with whom the prisoner lodged was called by the Crown and said that the prisoner was not at home on the particular night. It was considered advisable to break her down in cross-examination, which was to this effect :—

Q. "How do you say he did not come home that night ?

A. "Because I sat up."

Q. "But might he not have come in and you not have heard him ?" A. "He could not."

Q. "You might have been asleep ?" A. "I was not asleep."

Q. "How long did you sit up without going to sleep ?"

A. "Until four o' clock in the morning."

Q. "How do you know he did not come in while you were asleep." A. "Because I looked in his bedroom to see if he had been in and his bed had not been slept in."

There was nothing more to be asked. Counsel for the accused could not have expected to gain anything by these explanations.

(iii) In another case of murder, in which a witness had sworn to the body of the deceased by certain work which he had done to the dress in which the body was clad, the question was asked :

Q. "Do not all dress-makers sew much alike ?" A. "Yes."

Q. "How, then can you say this work is yours ?"

A. "Because I know my work from everybody else's."

Referring to this Mr. Harris says :—"I often wonder what the fascination is that leads so many counsel to ask a hostile witness, "How do you know that?" "Why do you say that?"

"How?" "Why?" "Wherefore?" "What is the reason?" What is your opinion?" are a nest of snakes for the innocent beginner to lay hold of. Harris' *Illustrations in Advocacy*, p. 100.

For further illustrations, see Chapters on "Gun-firing," "Poisoning," "Of Doctor," "As to Identification," "As to Insanity," "Of False Witness," etc. For case law See *Prem's Criminal Practice* 1947 (4th, Ed).

## CHAPTER 64

### In Poisoning Cases

In order that counsel should effectively cross-examine a medical witness in a poisoning case he should have a thorough knowledge of the various poisons. He should particularly know how much would be the fatal dose of a certain poison ; what would be the duration and the effect of the poison, and what will be the symptoms of the body in case of death by poison. The following are some of the poisons which are usually administered and which form the subject of cross-examination in a murder trial.

(1) Aconite, (2) Arsenic, (3) Atropine, (4) Carbolic acid or phenol, (5) Castor oil, (6) Cocaine, (7) Dhatura, (8) Hydrochloric Acid, (9) Mercury, (10) Nicotine, (11) Nitric Acid, (12) Opium, (13) Phosphorus, (14) Prussic Acid, (15) Santonine, (16) Strychnine, (17) Sulphuric Acid.

The fatal dose, duration and symptoms and test of the poison are set forth in detail in *Prem's Criminal Practice* under the heading (Poison).

Medical Jurisprudence by Taylor and Criminal Investigation by Dr. Hans Gross should also be consulted on the point.

A lawyer will be treading on a very risky ground if he takes up the cross-examination of a medical witness without acquainting himself fully with the properties and tests of the above-mentioned poisons.

**Hurt by Poisons :—** Causing hurt by poison is punishable under Section 328, I. P. C. The following cases will be found useful :— One B was found by Police wandering about in a peculiar condition with C and R. He had some money and went to sleep. The money was missing. He showed signs of *Dhatūra* poisoning and some money was found with R. R gave some drugged *pans* to other companions. Held, that on this circumstantial evidence R could not be convicted of administering *Dhatūra*. 1923 L. 687 : 77 I. C. 981 : 25 Cr. L. J. 517.

Accused mixed milk bush juice in his toddy pots, knowing that if drunk by a person it would cause injury, with the intention of detecting an unknown thief who always stole his toddy. The toddy was drunk by some soldiers who purchased it from some unknown soldiers. Held, he was guilty under S. 328. 5 B. H. C. (Cr. C.) 59.

Accused a youth of 21 years administered poison to his brother and his family, under the instigation of a person who absconded. They were all saved. The High Court considering the possibility that accused may after discipline become a fit to be a safe member of the society convicted him under S. 328. 1931 P. 346 : 134 I. C. 639 : 32 Cr. L. J. 1228.

**Murder by Poison.**—A number of murders are committed by administering poisons by the accused. The majority of cases in India are those in which a wife administers arsenic or *Dhatūra* to her husband at the instance of her paramour. The victim takes the poisoned cup from the hand of his wife whom he loves as if it is nectar, but the treacherous wife plays him false and proves a devil in the form of a woman. Sometimes poisoned food is taken by some guest of the husband. The evidence connecting the accused with the crime is sometimes not conclusive, as there is always a possibility of some body else having mixed the poison in the food, and the person administering the poison may be only dupe in the hand of a clever person. The following cases will explain this point. Accused prepared sweets containing poison with the intention of giving it to her husband, who ate it along with others. One of the guests died in consequence of it. Held, she was guilty of murder. 39 A. 161, 22 M. L. J. 333, 45 A. 557.

Daughter gave birth to a child and her mother only attended her. The infant soon after died of poisoning. Held, both would be presumed to have administered it and the fact that they took no step to save the life of the infant is evidence of intention. 43 P. W. R. 1910 Cr.

When the poison was administered by the accused as a drug which would bring the deceased under her control and that she did not know it was poison, she was not guilty. 14 Cr. L. J. 586 : 21 I. C. 378.

The Civil Surgeon was unable to say what poison was administered and there was no evidence on the record as to what poison was administered, accused was not guilty. 85 I. C. 817 : 26 Cr. L. J. 593 ; 1928 L. 325.

In a case of poisoning the evidence should be complete as to the history of articles containing poison and it should be shown that they were kept in proper custody throughout if they are to be relied on as supporting a conviction. 7 Bom. L. R. 640.

Where accused was proved to have put some powder in the food, which was found by Chemical Examiner to contain poison, but there was no evidence of the

quantity of poison found in the food or the probable effect on any one who might have eaten it. Held, that the accused could not be held to have intended to cause anything more than hurt, he was guilty of attempt to commit an offence under S. 328. 5 L. B. R. 79.

Accused gave poisoned rice water to an old woman who drank part of it herself and gave the other part to a girl who died of poisoning. Held, he was guilty of murder. (1869) 12 W. R. (Cr. L.) 2, 39 A. 161, 22 M. L. J. 333, 27 Cr. L. J. 1400.

On a charge of murdering his mistress the only evidence led was that two pieces of ropes stained with blood and to which were adhering human hair and also bajra cakes containing arsenic were found but there was no evidence that she was poisoned. Held, he was not guilty. 66 I. C. 422 : 23 Cr. L. J. 278.

A violent presumption arises when a man dies of poison in his own house surrounded by his own family and after eating food prepared by his wife and no explanation is coming forth from the occupants of the house as to what happened and when an attempt is made to hide the corpse and there is persistent lying in an attempt to account for his absence, and presumption become certainty. 97 I. C. 44 : 1926 A. 737 : 27 Cr. L. J. 1068 : 49 A. 57.

Accused who was greatly displeased with the wife of his brother came to get her child from her. He took the child but was over persuaded by others to let the child remain. He gave the child some sweets, who died of poison. Held, he was guilty of murder. 1929 O. 516 : 119 I. C. 870 : 30 Cr. L. J. 1118.

Mere evidence that deceased drank milk offered by accused and died soon after exhibiting symptoms of poisoning is insufficient for conviction. 25 P. W. R. 1911 Cr. : 241 P. L. R. 1911.

Accused gave aconite to a girl to administer it to her husband, in order to gain his love. She gave it in food to her husband, and father-in-law, and the latter died. Held, that accused was guilty under Ss. 302—115 though not under Ss. 302—109, I. P. C. 1931 C. 757 : 134 I. C. 896 : 33 Cr. L. J. 79 : 59 C. 1228.

Accused contracted illicit intimacy with another and became pregnant. She was alone at the time of birth and had every motive to do away with the child. She admitted, she had opium four days before the occurrence. The death of child was due to opium. Held, that the only inference was that accused administered opium and committed murder. 1932 L. 279 : 137 I. C. 259.

In a case of poisoning, death from poison and administration of poison by accused should be proved. 1934 O. 62 : 148 I. C. 600.

In a case of poisoning by wife, voluntary confession though retracted along with recovery of various articles stained with poison in his house and discovery of poison in viscera and vomits is sufficient corroboration. 1934 L. 15 (2) : 15 L. 310.

In case of murder by poison three things are to be proved; firstly, did the deceased die of poison in question; secondly, had the accused got the poison in question; and thirdly, had the accused opportunity to administer the poison to deceased. The question of motive is of subsidiary importance. 1933 A. 394 : 34 Cr. L. J. 754.

Evidence that accused poisoned other persons with *Dhatūra* before or after the act charged is admissible to show that the act was inten-

tional and not accidental. 32 P. L. R. 1911, 1923 N. 248 : 24 Cr. L. J. 566.

Where no motive is proved, though the conduct of accused is suspicious and the evidence of poison vendor is not convincing, the circumstantial evidence is not sufficient. 1986 P. 486: 164 I. C. 1079. For other cases See Prem's Criminal Practice 1947.

**Arsenic Poison.**—Arsenic poisoning is very common therefore full discussion on the subject neccessary.

**Fatal dose.**—The fatal dose in an adult may be assigned at from two to three grains. Taylor's Med. Jur., 1928, Vol. II, p. 492.

**Durations.**—The average time at which death takes place is twentyfour hours; but the poison may destroy life within a much shorter period. There are many authentic cases reported in which death has occurred in from three to six hours. *Ibid.* p. 493.

**Symptoms.**—In an acute case of arsenical poisoning by the mouth of individual usually first experiences faintness, depression, nausea, and sickness, with an intense burning pain in the region of the stomach, increased by pressure. The pain in the abdomen becomes more and more severe; and there is violent vomiting of brown turbid matter, mixed with mucus and sometimes streaked with blood. These symptoms are followed by purging which is more or less violent. The colour of the vomited matters may be blue or black when coloured arsenic has been taken, or the admixture of bile may render them of a deep green. The pulse is small, frequent, and irregular, sometimes wholly imperceptible. This is almost constant and is probably due to the direct action of the poison on the heart muscle. The skin is cold and clammy in the stage of collapse, at other times it is hot. The respiration is painful from the tender state of the stomach. There is great restlessness, but before death stupor may supervene, with paralysis, tetanic convulsions, or spasms in the muscles of the extremities. *Ibid.*, p. 495. See Criminal Investigation by Dr. Hans Gross, 1934, p. 442.

**Use of.**—Arsenic is largely used as an antidote to fevers of all kinds, as an aporodisiac in cases of rheumatism, gout, and syphilis, and externally for skin diseases such as itch and eczema. It is also employed for many industrial purposes, as curing skins and gold-working; and preserving roofs, floors, and walls of buildings from the ravages of vermin and particularly white ants. See Criminal Investigation by Dr. Hans Gross, 1934, p. 442. Taylor's Med. Jur., 1928, Vol. II, p. 923.

The following cases will illustrate the criminal liability of the person administering the arsenic :—

Accused gave arsenic poison intending to cause death but through some cause or other, the person to whom it was administered recovered. Held, he was guilty under S. 307 (Attempt to murder) and S. 328, I. P. C. 22 Cr. L. J. 194 : 60 I. C. 50. A wife administered arsenic in *Halva* to her husband believing it to be a charmed thing, to induce him to divorce her. There was evidence to show that she did not know that it contained arsenic. Held, she was not guilty. 1922 L. 55 : 4 L. L. J. 445. When it is not certain whether wife or some body else gave arsenic to the deceased, the mere fact that particles of arsenic were found on some utensils is not sufficient to convict the wife. 1923 L. 537 : 77 I. C. 600 : 25 Cr. L. J. 424. Accused administered arsenic to a boy of 9 years with the object of preventing the father of the boy from appearing as witness against him in Criminal case, but in such a quantity that the boy died in the course of 3 days, it was held, that he was guilty of murder, though his intention might not have been to cause death. 40 A. 360, 28 Bom. L. R. 1003.

The accused sent sweetmeats poisoned with arsenic to A with the intention of causing her death, but A, B and C partook of it and they all became seriously ill but recovered. Held, he was guilty of attempting to murder B and C as well. 3 L. L. J. 191.

Wife administering arsenic to her husband in milk is guilty of murder. 1930 O. 502 : 128 I. C. 282. In cases of arsenic poisoning mere examination of the vomit or nightsoil is totally insufficient and it is extremely dangerous to rely upon some traces of arsenic found in either of these two things. The proper examination consists in the careful examination of viscera of body. 1930 A. 532 : 125 I. C. 585 : 31 Cr. L. J. 862.

Where the evidence that accused had arsenic or gave anything to eat to the deceased is not given, the conviction for murder is bad. 32 I. C. 838 : 17 Cr. L. J. 102.

It must be proved that the deceased died of arsenic poisoning and that accused administered arsenic. Evidence of *post mortem* Doctor that from appearance of stomach and intestine his opinion was that death was due to arsenic is not sufficient. 1933 A. 837 : 146 I. C. 1089.

**Dhatara Poison :—***Dhatara* is more commonly administered for poisoning than any other. As to whether *Dhatara* poisoning amounts to an offence under S. 328 or 307 or 302, I. P. C., the following cases may be noted :—

Administering *Dhatara* to cause a young girl to fall in love with accused is an offence under S. 328 if delirium is caused, with the possible risk of falling into coma. 46 A. 77 : 1924 A. 215 : 21 A. L. J. 844.

Where for a purpose of facilitating robbery *Dhatara* was administered to certain travellers, one of whom died. Held, that the offence with regard to the person who died fell under S. 325 and with regard to other under S. 328, I. P. C. 30 A. 568, 28 P. R. 1881 Cr.

Where accused administered *Dhatara* to a person to facilitate robbery and he died, the accused was guilty under S. 302. 31 A. 148, 40 A. 360, 45 A. 557, 28 Bom. L. R. 1003, 19 P. R. 1916 Cr. See 19 P. R. 1919 Cr.

Accused boy of 16 years fell in love with a girl of 13 years of age, persuaded another young boy to give her sweetmeat to eat, which he believed to act as a love philtre. There was no intention to cause hurt to any person. The persons who partook of the sweets showed symptoms of *Dhatara* poisoning. Held, he was guilty under S. 323, I. P. C. 46 A. 77 : 26 Cr. L. J. 413.

Where the intention of the accused was primarily to stupefy the victim by *Dhatara* and then rob him but poisoning was fatal. Held, he was guilty of murder. 1927 A. 104 : 98 I. C. 712 : 27 Cr. L. J. 1400, 28 Bom. L. R. 1003, 31 A. 148, 45 A. 557, 32 P. L. R. 1911. See 19 P. R. 1919 Cr. and 30 A. 568.

A young woman administered *Dhatara* to three members of her family who ultimately recovered. Held, she was guilty of attempt to murder. 20 A. 143, 63 I. C. 50.

Where a large quantity of *Dhatara* is administered, the offender shall be intended to cause the death of the victim for the successful termination of the crime. 55 I. C. 479 : 21 Cr. L. J. 319 : 3 P. W. R. 1920 Cr.

Accused administered *Dhatara* in *sherbab* to a boy of 10 years of age, in order that his mother would bring him for treatment and they would be under his influence. The boy died after three days. Held, he was guilty of murder, but death sentence should not be passed. 1930 L. 90 : 120 I. C. 534 : 31 Cr. L. J. 140.

**Symptoms of.**—The most distinctive external symptoms of *Dhatara* poisoning are giddiness, followed by drowsiness and muttering delirium, picking at imagi-



nary objects, sometimes wild and excited behaviour, but always wide dilation of the pupils of the eye, while internally the brain is congested, and so also frequently are the lining of the mucous membrane of the stomach and intestines. Criminal Investigation by Dr. Hans Gross, 1934, p. 443.

*Use of.*—*Dhatūra*, the poison of the *thugs*, is still used mainly to facilitate robbery, and that chiefly in the western districts of India, where traditions, even memories of these daring depredators still exist. It has been pointed out that as *Dhatūra* is popularly supposed not to be poisonous to death, the fatal result is due to the overdose necessary to put the robber on the safe side. *Ibid*, p. 443.

Accused administered, *Dhatūra* poison to A and B who died. Next day he gave the poison to D who died. The facts against A and B are relevant to a case of murder of D, as forming incidents in a series of similar transactions occurring about the same time and tending to show system and intention 32 P. L. R. 1911 : 12 Cr. L. J. 125.

Where accused is charged with murder, for having administered *Dhatūra* to the deceased, the evidence of certain boys that he had previously offered sweets to boys and that one of the boys was afterwards robbed of ornaments, when affected with the symptoms of *Dhatūra* poisoning, is admissible. 73 I. C. 262.

The fact that the deceased offered sweetmeats to other boys and poisoned one of them with *Dhatūra*, is not evidence that he administered poisoned sweetmeats to the deceased. 1923 N. 248 : 24 Cr. L. J. 566 : 73 C. 262. For other cases *See* Prem's Criminal Practice 1947

**Attempt to murder by poison** :—When the quantity of poison is not known, it cannot be said that the accused intended to cause more than hurt. 8 I. C. 721. A young widow administered *Dhatūra* to the members of her family in order to elope with her paramour. They were all saved by the doctor. Held, she was guilty under S. 307, 20 A. 143, 60 I. C. 50. Asking a doctor to supply medicine for poisoning a person is not an attempt to murder. 24 P. R. 1882 Cr. Accused attempted to poison A, but A shared the poisoned sweet with B who also suffered from poison. He was guilty of attempting to murder B also. 1921 L. 108 = 22 Cr. L. J. 194. For other cases *See* Prem's Criminal Practice 1947 (4th Ed).

### Illustrations.

(i) An example of a skilful cross-examination is found in the report of the trial of William Palmer at the Old Bailey for poisoning of one Cook by strychnine. The defence sought to show that the cause of death was tetanus, and called a celebrated medical man of Leeds, who said the symptoms were of tetanic: that Cook was a man of delicate constitution, had a sore resulting from disease, was excitable, and that on a man of such a constitution and temperament having the sore, a slight cold would have the effect of causing idiopathic tetanus. On cross-examination by Mr. Cockburn the doctor was forced to admit that he did not really know that the deceased was delicate, and had not learned that the organs were found in a healthy condition after death. He was made to confess that he did not know the deceased had ever had any such disease or sore as referred to in his direct testimony; he also admitted there was no ground for supposing that Cook had a cold. Cockburn then incisively inquired :—"Now, Sir, with the delicate constitution gone, the disease gone, the sore gone, the cold gone, what grounds have you for saying that there was idiopathic tetanus?" The unhappy physician squirmed, hedged and took refuge in several general assertions, which were however completely demolished by his

relentless inquisitor, while the effect of the testimony was entirely overthrown by the superior knowledge of poisons displayed by the lawyer who conducted the cross-examination. See 14 Cr. L. J. 20-21 (Jour).

(ii) In the famous Crippen trial which was a case of hyoscin poisoning, the remains of the murdered woman which had been horribly mutilated were found beneath the floor as a "mass of flesh" several days after the crime. The medical evidence was most sensational and "eight eminent doctors and surgeons wrangled with counsel over hardly recognisable pieces of flesh, which were handed about the Court in a soup plate; and discussed the process of putrefaction and the possibility of alkaloids, found in the body, being due to that process and not to hyoscin." The properties of hyoscin were then known to very few men. It is a deadly poison and even so small a dose as one-fortieth of a grain has been known to produce severe symptoms. In Palmer's case, the question was whether Cook died of traumatic tetanus or from tetanus produced by strychnine poisoning. Sir Alexander Cockburn who led for the Crown was faced with a most difficult task and exhibited a wonderful knowledge of the properties of strychnine. The difficulty was enhanced by the fact that no trace of strychnine was revealed by the *post mortem* examination. It was a case of "Who shall decide when doctors disagree," Sir Alexander Cockburn's theory was that strychnia was administered in an almost imperceptible dose and his presentation of the scientific facts and cross-examination of medical witness for the defence was a performance rarely met.

(iii) Dr. Buchanan was charged with the offence of having poisoned his wife—a woman considerably older than himself, and who had made a will in his favour—with morphine, and with atropine, each drug being used in such proportion as to effectually obliterate the group of symptoms attending death when resulting from the use of either drug alone.

At Buchanan's trial the district attorney found himself in the extremely awkward position of trying to persuade a jury to decide that Mrs. Buchanan's death was, beyond all reasonable doubt, the result of an overdose of morphine mixed with atropine administered by her husband, although a respectable physician, who had attended her at the death-bed, had given it as his opinion that she died from natural causes and had himself made out a death certificate in which he attributed her death to apoplexy. It was only fair to the prisoner that he should be given the benefit of the testimony of this physician. The district attorney, therefore, called the doctor to the witness-stand and questioned him concerning the symptoms he had observed during his treatment of Mrs. Buchanan just prior to her death, and developed the fact that the doctor had made out a death certificate in which he had certified that in his opinion apoplexy was the sole cause of death. The doctor was then turned over to the lawyers for the defence for cross-examination. In such a case one would suppose that no questions are necessary in cross-examination. But the counsel for the defence put this most irrelevant and dangerous question to the witness. "Now Doctor you have told us what this lady's symptoms were, you have told us what you then believed was the cause of her death, I now ask you, has anything transpired since Mrs. Buchanan's death which would lead to change your opinion as it is expressed in this paper?"

The doctor having heard the question read a second time, paused for a moment, and then straightening himself in his chair turned to the cross-examiner and said, "I wish to ask you a question. Has the report of the chemist telling of his discovery of atropine in the contents of this woman's stomach been offered in evidence yet?" The Court answered, "It has not."

"One more question," said the doctor. "Has the report of the pathologist yet been received in evidence?" The Court replied, "No."

"Then" said the doctor, rising in his chair, "I can answer your question truthfully, that, as yet, in the absence of the pathological report and in the absence of the chemical report I know of no legal evidence which would cause me to alter the opinion expressed in the death certificate."

(iv) In this case a young woman of somewhat prepossessing appearance was charged with poisoning her husband. They were people in a humble class of life, and it was suggested that she had committed the act to obtain possession of money from a burial fund, and also that she was on terms of improper intimacy with a young man in the neighbourhood. A minute quantity of arsenic was discovered in the body of the deceased, which in the defence, was accounted for by the suggestion that poison had been used carelessly for the destruction of rats. The Judge, Mr. Baron Parke, charged the jury not unfavourably to the prisoner dwelling pointedly upon the small quantity of arsenic found in the body, and the jury without much hesitation acquitted her. Dr. Taylor, the Professor of Chemistry and an experienced witness, had proved the presence of arsenic, and, to the great disappointment of the solicitor, who desired a severe cross-examination, counsel for accused did not ask him a single question. He was sitting on the Bench and near the Judge, who after he had summoned up and before the verdict was pronounced, remarked to him that he was surprised at the small amount of arsenic found; upon which Taylor said that if he had been asked the question, he should have proved that it indicated under the circumstances detailed in evidence, that a very large quantity had been taken. The Professor had learned never to volunteer evidence, and the counsel for the prosecution had omitted to put the necessary question. Mr. Baron Parke, having learned the circumstance by accidental means, did not feel warranted in using the information and this is a good lesson in the art of silent cross-examination.

(v) The following is another instance of cross-examination of a medical witness conducted many years ago by Gerritt A. Forbes of New York who afterwards became a Justice of the Supreme Court. He was defending a woman charged with having murdered her mother by poisoning. The defence was that the deceased died from natural causes and it was sought to show that the *post mortem* examination had revealed a condition of the vital organs which made it impossible for any physician to determine with certainty the exact cause of death. The doctor who had conducted the *post mortem* testified that in his opinion death was caused by arsenical poison. Forbes drew out from him on cross-examination the general condition of the deceased as disclosed by the autopsy, and then asked if a man went under a tree during a thunder-storm, and that tree was struck by lightning, and if his dead body was afterwards found with marks of the electric fluid upon it, and also with a bullet through his brain, and a dagger through his heart, and if an autopsy showed the presence of poison, what, in your opinion, would be the cause of death. This line of defence proved successful, for notwithstanding the strong case presented by the prosecution, showing both opportunity and motive, the jury rendered a verdict of acquittal. 14 Cr. L. J. 21.

(vi) In the year 1873 the Maharaja of Baroda was tried on a charge of attempting to poison the Resident, Colonel R. Phayre. The defence was conducted by Sergeant Ballantine. One of the witnesses examined was Damodar Punth, the Secretary of the Maharaja. It was suggested on behalf of the

Gaekwar's Counsel that the witness Damodar Punth was the author of the attempt to poison. The testimony of Damodar Punth was mainly directed to two important matters, viz., the proof of the purchase of arsenic and diamonds in particular quarters and that under directions from the Maharaja the packets containing the same were to Salim to be handed over to Rowji.

His deposition being to the effect that the Maharaja ordered him to buy packets of arsenic and diamond dust which were given to Salim to be conveyed to Rowji—that he made a confession on being promised a pardon by Sir L. Pelly. He explained the manner in which the Gaekwar's private accounts were kept and traced payment made to the Maharaja confidential servants, Yes santrao and Salim for residency servants. He stated that after the attempt to poison had been discovered, he by the Maharaja's order, had a false entry made in the accounts to conceal the purchase of diamond dust. Other entries of payments made to Salim were obliterated or falsified.

Cross-examined by Mr. Serjeant Ballantine—Just a question or two about these accounts: I understand you to say that the accounts which you have spoken of were all fictitious—that the accounts that have been put in were all fictitious? A. Not all the accounts.

Q. The greater part of them? A. Such portions of them as were made up for the purpose.

Q. And, as you say, these falsifications were made by the directions of the Maharaja?

A. Yes, by the directions of the Maharaja.

Q. Given to you from time to time, or generally—had you a general authority to falsify the accounts, or only receive the authority from time to time? A. As there was occasion from time to time, I used to ask and he used to say. (Interpreter—That is, give instructions).

Q. You used to ask permission to falsify them?

A. Yes, as there was occasion. The Maharaja knew the occasion for what the money was to be paid, and he used to tell me.

Q. And you asked his permission, and he gave it? A. Yes.

Q. But if these accounts had been investigated, had you any means of showing that you had any authority from the Maharaja?

A. What more need I show? Everything I did was under the orders of the Maharaja.

Q. So you say. What I want to know is—supposing the Maharaja, for instance, had charged you with robbing him, and altering the accounts for the purpose of that robbery, had you any means of showing that you had his authority for what you had done? A. The receipt and the entries are in four books, and there is the man who received the money and the man who paid it.

Q. Had you any means of showing that you had the authority of the Maharaja, is what I want to know, except your own assertion? A. I had no other authority, only the order.

Q. That is not quite the answer, Had you any means, except your own assertion, to show that the Maharaja had given you these orders? A. By such orders of the Maharaja lakhs of rupees have been expended during the last four years.

Q. Yes, by such orders of the Maharaja lakhs of rupees have been expended during the last four years, and accounts falsified? A. Where there was occasion, they might have been done or made.

Q. And you were the man who did it ?

A. The Maharaja told me, and I caused the *karkoon* to do it.

Q. Now, what I ask you is this—and reflect before you answer—supposing you had been charged by the Maharaja, or anybody else, with cheating and robbery, had you any means whatever of proving that you had the Maharaja's authority for what you did ?

A. The papers themselves contained the means.

Q. Nothing but the papers ?

A. And there are receipts endorsed thereon.

Q. Have you a single written word of the Maharaja justifying you in what you have done ? A. Unless with the Furnese there is no writing. (Interpreter—Furnese literally means “secretary.”)

Q. What I want to know is can you produce a single letter in the handwriting of the Maharaja justifying your falsification of the books ?

A. I have none in the Maharaja's handwriting.

Interpreter. He adds something.

Serjeant Ballentine. If he adds something, you had better let us hear what it is.

Witness. But there are papers signed by the third wife of the Maharaja, Luxmeebaee.

Q. But not a signature of his ; you have no signature of his ?

A. She used to sign under the orders of the Maharaja, and there are seals attached.

Q. Have you any signature of his ?

A. During the four years, the Maharaja never signed any paper belonging to my department.

Q. What I wanted to knowed is how you were to defend yourself if you had been charged with robbery upon the foundation of those false accounts admittedly in your own handwriting ?

A. There are writings (Interpreter—entries) at five places, and I could have easily made my defence from them.

Q. Are there any entries in the handwriting of the Maharaja ?

A. The general statement or the annual statement was once signed by the Maharaja in one year.

Q. Have you got his signature ? A. Yes.

Q. Then you can produce it.

A. If you send for it, it will come, it is under attachment.

Q. Very well, we will see whether it comes. I just want to know—were you aware that there was an intention to investigate your accounts any time ? A. By whom ? Who was to investigate ?

Q. By any one ? A. There was nobody besides the Maharaja to examine my accounts before the attachment.

Q. Were you told by the police that your accounts would be investigated ? A. After attachment they showed the papers, and said enquiry was to be made. The papers over which ink had been poured were shown to me.

Q. Did they tell you that your accounts would be investigated ?

A. They had said generally.

Q. What was your salary ?

A. My pay was Rs. 200 and my brother's Rs. 400 per month.

Q. Well, now, I just want to learn something about the way in which your confession was given. You were given into custody upon the same day as the Maharaja ?

A. Yes on the same day, in the evening.

Q. You had known, I suppose, of Rowjee and Nursoo and other having been examined by Mr. Souter ?

A. I used to hear the report.

Q. And I suppose you took some interest in it ? A. If I got any information, I used to communicate it to the Maharaja.

Q. Well, I suppose you took some personal interest in it. Did you not ?

A. Why should I have a personal interest ? Why should they allow me to come here ?

Q. I will tell you at once why you should have some personal interest. You had been a party assisting in the attempted murder ?

A. Yes, I did assist.

Q. Then it occurs to me that that would give you some little interest in the enquiry ?

A. Yes, of course, with a view to save the Maharaja and to save myself.

Q. Principally to save the Maharaja, and a little for yourself ?

A. Yes, now, as there is an attachment I must be saved.

Q. Then taking some interest for the sake of the Maharaja, and a little for yourself, did you find out what Rowjee and other witnesses had said ? A. I used to hear a report directly from the town, while Salim was at large he used to tell.

Q. And then you heard that a bottle had been mentioned by Rowjee ? A. I was in confinement. I could not hear.

Q. No, no, but I am talking of when you were out of confinement. Rowjee was examined when you were out of confinement, you know ?

A. No, I did not hear.

Q. Do you mean that you did not hear that he had said that a bottle had been given to him ? Now take care.

A. Nobody gave me information. (Interpreter—That is, this information).

Q. Nobody told you about a bottle ?

A. Nobody told me about a bottle.

Q. Did you hear about the powders being put into Colonel Phayre's glass ?

A. Yes.

Q. Did you hear that it was said to be arsenic ? A. Yes.

Q. And diamond dust ? A. Yes.

Q. And heard that Rowjee had admitted that he had attempted to murder Colonel Phayre ?

A. Yes, I had heard of it, and mentioned it to the Maharaja.

Q. How came it, as you were a party to his attempted murder, and knew that Rowjee and others were in custody, that you did not destroy all the papers that had a bearing upon the subject ?

A. What papers were there relating to the matter ?

Q. I don't wonder at your asking. You know you have told us that several papers related to the matter ?

A. You mean the papers referred to in my deposition ?

Q. Can you have any doubt that I mean them ?

A. I must understand properly. If there was papers at one place, they could have been destroyed, but they were in five places, and therefore they could not be destroyed.

Q. Now, just attend to me. If your story is true, you know that those papers were in connection with your own acts to procure the poison which was used, then why did you not destroy them ?

A. All the papers except two, refer to bribes—only two refer to that matter.

Q. But did you not know also that there was an enquiry about the bribes ?

A. I did not know of it then.

Q. Will you swear that you did not know of it during the time the enquiry was going on before Mr. Souter ? A. Yes, I can swear I was not in his service, nor had he given me any information.

Q. Why, when you knew enquiries were going on in relation to the conduct of the Gaekwar, did you not destroy these papers ? You had them in your possession ?

A. All papers could not be destroyed ; if they were at one place they could be. The paper of the *juwurkhana*—the jewel department—was only one. That was caused to be torn up.

Q. What was there to prevent your destroying everyone of the papers that were produced to-day ?

A. There was this objection—in the book of the Jamadar, or treasurer, the money paid is stated. There is a *rozmel*, a general day-book, and usually, thirdly, there is a memorandum, and there is a receipt endorsed upon it, and after that the journal now shown is prepared, and after that the monthly statement is prepared, and they are stitched up, and the sheets are stitched up ; so to destroy so many papers at so many places would be a difficult job. If the money was given in one amount the papers would have been destroyed.

Q. Just let me have those documents, the whole of them, that have been produced by this witness. I won't disturb them at all in point of fact. (Handed to him) Now I see that all these documents are upon separate sheets, not bound up in a book ?

A. The Memoranda are on separate pieces of paper.

Q. Now I want to know what was there to prevent your destroying everyone of these papers if you chose to do so ?

A. "If the money was paid in one amount or at one time there would have been no objection to destroy them.

Q. "I will have an answer to my question—what was there to prevent you destroying every one of these papers which have been produced in confirmation of your guilt and that of the Maharaja ? A. There was no convenience to destroy the papers at so many places.

Q. What do you mean by no convenience ?

A. There was no help, they could not be torn.

Q. Just tell me this—what do they do with people in this country who are guilty of poisoning others ?

President—Are you right in using the word “convenience”?

Interpreter—“Saved” is the word used. Sir Dinkur Rao will know it.

President—Sir Richard Meade says it means “opportunity.”

Interpreter—It is a common word.

Serjeant Ballantine—“Opportunity” and “convenience” mean totally different things.

President—Quite different things. Sir Dinkur Rao says that it means rather opportunity. For what we should call “opportunity” we should not say “convenience.”

Serjeant Ballantine.—I don't think, as I follow this out, that the fine meaning of the word be important; but still it has a very different meaning, and it may make a very important difference.

The Interpreter refers to the word “saved” in the dictionary, wherein the word defined as “an interval, leisure, or convenience; a brief intermission, a present occupation, a vacant or spare moment.”

Q. Serjeant Ballantine.—Probably that definition would apply to either, but it would seem to be the idiom rather to mean “opportunity” here than “convenience.”

Now I was just asking you that little question which I daresay, under all the circumstances, you can answer me—what do they do with people in this country who are found guilty of poisoning others?

A. What do they do?—they are punished.

Q. I suppose so, but what do they do with them? Do they hang them as they do in our country? A. Whatever punishment they may give, but I have not seen the law.

Q. You have not looked into the law upon the subject, but have you no notion? A. Yes, I have a notion.

Q. I should have thought that you had some interest in the question. Just tell me what do they do?

A. Whatever the Judges think proper, they do. What can I say?

Q. But do they sometimes hang them?

A. Not at Baroda. I have not seen.

Q. You have not seen it, but still you know your neck might be in some risk, and therefore I ask you the question? A. Is my neck in risk—?

Q. It *was* in risk; it is all right now. Now why did you not give me an intelligible reason for your not destroying papers which might have been the means of losing you your life, if found? A. I have given the reason.

Q. Then you shall repeat it? A. Such papers were at many places, therefore there was no convenience to destroy them.

Q. They were all under your control, sir? A. Yes, they were.

Q. And you could get at them all? A. I used to send for them whenever the Maharaja sent for information.

Q. Never mind the Maharaja. Was there anything to prevent your getting hold of them if you wanted them? A. They were with me.

Q. What objection was there? A. They were in my charge.

Q. Then, being in your charge, and knowing that they would implicate you in a charge of attempted murder why did you not destroy them? A. At that time I was not aware that there would be an attachment, and that this time will come (Interpreter—“That he would be put in this position.”)



Q. That is the only reason you can give? A. Yes, no other reason.

Q. Well, now, will you be kind enough to answer this question? If you did not contemplate that this time would come, and that was the person why you did not destroy the papers, why did you obliterate any part of them? A. The ink was poured because there were no particulars of the goods.

Q. To hide something? A. Yes.

Q. Connected with Salim? A. Yes.

Q. And connected with these transactions? A. Yes, to conceal.

Q. Then, why, if you thought it worth while to obliterate a part, did you not destroy the whole? A. I had orders to give and I had told *karkoon* to do as he could conveniently.

Q. Well, I will just now ask you a question which will summarise this branch. Are you quite sure that you have not invented the whole story of these papers for the purpose of accusing the Maharaja?

A. With a view that the Maharaja may not be accused and this proof might not be found, this thing was resorted to.

President (to Interpreter).—I don't think you put the question properly. I think you are rather too hasty.

Serjeant Ballantine (to Interpreter).—Just follow me. It may be my fault, I am too quick. Just put this plainly to the witness. Will he swear that he has not invented the whole story of these documents for the purpose of accusing the Maharaja of being connected with this poisoning?

Witness.—Not with a view to accuse the Maharaja.

Sir Dinkur Rao—The papers, as they were, were not sufficient to bring any accusation against the Maharaja, but by pouring ink upon them an accusation is brought.

Witness. Because the Maharaja told me to obliterate, I poured ink. The Maharaja said "Employ any means and make the arrangement."

Serjeant Ballantine—Now, you know—just to follow the Commissioner's view—did it not occur to you that the very mode by which attention would be attracted to these documents would be these great splotches of ink that you poured upon them?

A. Not at that time, it did not occur.

Q. It does occur to you now?

Serjeant Ballantine. Perhaps your Lordship will allow me to hand these documents up.

President. Not at present.

Serjeant Ballantine. Well now, just a question or two further—did not you think it was rather a foolish thing to do, put all those splotches of ink on?

A. Now I feel from the consequences that they have incurred.

Q. But that did not occur to your mind before?

A. I did not at first think there would be an attachment.

Q. No, no. But did it not occur to you that these splotches of ink would attract attention?

A. When I was not under the impression that there would be an attachment, how should I bear any other impression about these.

Q. Then why did you do it?

A. In order to prevent the matter going out.

Q. Unless you had made a confession of some kind do you think you would ever have got out of the jail ?

A. I could not have got out of the jail.

Q. You, first of all were put under a European guard ?

A. For two days I was made to sit on the Senaputtee cutcherry or office at Baroda.

Q. Alone or in company with any companion ?

A. My companion was a sepoy, and I was there.

Q. Two days and two nights ? A. Yes.

Q. I suppose you went to bed ? A. I used to sleep there—where I used to sit I used to sleep—in the same place.

Q. With a sepoy to keep you company ? A. He was guardian to watch my running away. I used to consider him as my companion.

Q. Well, after that what did they do with you ?

A. From that place I was brought to the Residency.

Q. And what was done with you there ?

A. I was sent into a room guarded by European soldiers.

Q. And when were you handed over to the police ? A. After sixteen days when I admitted, when I made an admission or confession.

Q. And what are you doing with yourself now—I mean when you are not in the witness-box ?

A. They gave me a sepoy from there, they took me from the tent, and took me back there. If they tell me to get up, I get up, and if they tell me to sit down, I sit down.

Q. Then you are not in the custody of the police now ?

A. Yes, of the police peons or sepoys.

Q. What are their names—do you know their names ?

A. They are changed every four days. I do not know their names.

Q. What is to become of you when this is over—do you know at all ? A. That will depend upon all the Judges say.

Q. Just explain what you mean by that.

A. Whatever comes to their mind they will say.

Q. What do you mean by saying that what will happen to you will depend upon what the Judge will say ?

A. I am guilty, because I have admitted. If they like they will release me, if not I must hear their sentence.

Q. Then, I suppose, it depends upon what is the result of this inquiry. Suppose the Judges should not believe a word you said, what should you do then ?

A. I know that I will then be punished.

Q. But if the Judges believe all you say, shall you then get off ?

A. They will release me. I have got a certificate of pardon.

Q. How many plots were there to poison Colonel Phayre ?

A. All the plots which have been stated in the deposition.

Q. I am looking at the statement that you made before Mr. Richey, and I just ask you how many plots were there ?

A. I give these five things — four tolas of arsenic, two tolas of diamonds, and one bottle. Besides this if there was anything, I do not know.

Q. What is it you call in your deposition “physician’s stuff”? Is that the ants, snakes, &c.? A. Yes.

Q. Now, was that first, second, third, fourth or fifth attempt? Well, you say you know of three, was that the first attempt with the “physician’s stuff”?

A. The first or second, I don’t remember.

Q. Try and remember. A. How can I remember it just now?

Q. Well, but have not you said that that was the first attempt?

A. If I have said so, you will find it in the statement.

Q. Well, that is a remark that is perfectly true. I remind you that I am looking at what you stated before Mr. Richey. Did you not state before Mr. Richey “there were three distinct plots to poison Colonel Phayre,—first by physician’s stuff, secondly by poison in the plaster for Colonel Phayre’s boil and thirdly by the arsenic which was discovered?” A. I made that statement before Mr. Richey.

Q. And is that true? A. It is true. How could it be untrue?

Q. Then I suppose the physician’s stuff was the stuff contained in the bottle?

A. It was brought in a bottle which Goojaba brought, and I transferred it to my bottle.

Q. And put it into the otto-de-rose bottle? A. Yes.

Q. When was that? A. I don’t remember the date.

Q. Give me as near as you can. A. I did not then know that there would be an attachment, and that I would be granted a pardon or certificate. If I had known, I would have noted all the dates.

Q. Now try and see if you have got it noted down in your memory. A. I do not remember the date.

Q. Come, come, you have a very good memory. About when was the bottle given? A. I don’t remember, but it must be in Ashvun (Interpreter—Part of October and part of November.)

Q. What time in October does it begin?

Interpreter.—It begins on the 11th October and ends on the 9th November.

Q. Are you sure that it was within that time? A. Yes.

Q. How long before the Dewali? A. If I had remembered those dates, I would have given you the date.

Interpreter. The Dewali is the very following day after the month that you have mentioned.

Serjeant Ballantine. I am very much obliged to you, but I knew that before I asked the question. (To witness)—How long before the Dewali? A. I don’t remember.

Q. Was it a week before? A. A week or two; I cannot say.

Q. Well, was it a week or two, or was it more than two weeks?

A. It might be, I gave the bottle, I don’t remember.

Q. Was it more than two weeks before; let us have it particularly? A. The five items were given during the whole of Ashvun month.

Q. Now listen to me, my friend—when you gave this bottle did you perfectly well know it was for the purpose of poisoning Colonel Phayre? A. Yes, I was aware,

Q. I will just remind you that this was only last year? A. Last Ashvun.

Q. Then do you mean to tell me that you cannot say within a week when you gave a bottle for the purpose of poisoning a fellow-creature? A. No, I don't remember the day.

Q. I don't ask you the day : I ask you within a week.

A. That too I cannot say.

Q. Might it have been as early as August?

(Interpreter translates that month by Ashard.)

Witness. That had passed away two months before.

Q. Then it could not have been in August? A. What?

Q. That is a question to me?

Interpreter. Yes.

Very well, I will answer it. It could not have been in August.

(Interpreter, at the suggestion of the President, asks the question, using the words Ashard and Shrivun, each of which embrace a part of the English month August.) A. No.

Q. Might it have been in September?

(Interpreter here uses the names of the native months Shrivun and Bhadurvudh.)

Witness. The first note written to the Foujdaree was in Bhadurvudh, the 9th (corresponding to the 4th October, 1874.)

I am told that what he has said is that all this took place between the 4th October and the 9th November—since that day all this occurred.

Q. Between the 4th October and the 9th November all these attempts were made?

A. Yes, during that time all these five things were given. Between Bhadurvudh, the 9th and Ashvun, the 15th.

Q. Just about those sales of arsenic tell me, was there some edict in existence that no sales of arsenic should take place without the sanction of the Maharaja?

A. The arsenic could be had only at the Foujdaree.

Q. And could it always be had upon the Maharaja's order?

A. The officer-in-charge knows that.

Q. But do you not know? A. I don't know; ask the Foujdaree.

Q. Do you mean that you don't know that upon the order of the Maharaja arsenic could have been got to any amount?

A. With the Maharaja's permission it could be had.

Q. Why did you not say so at first? Why was it that when you had the Maharaja's permission you did not get it? A. Hormusjee Wadia said that after asking the Maharaja he would give the arsenic.

Q. I repeat the question, if you had the Maharaja's permission to obtain the arsenic, what was the difficulty in getting it?

A. The Maharaja had told me to bring it. He had not issued permission or an order to the officer himself.

Q. Why did you not get the Maharaja's order?

A. The Maharaja did not give an order, but told me to write a note and say the arsenic was required for horses.

Q. Have you seen Noorodeen Borah lately?

A. What do you mean by lately ?

Q. You know what I mean. A. Do you mean when I was at large or after I was in confinement ?

Q. When did you see him last ?

A. When do you mean—after I was in confinement ?

President—Let him give an answer to the question. Don't let him put questions in reply. When did he see him last ?

A. After I was in confinement he was brought before me once.

Q. How long is that ago ? A. I don't remember.

Q. Do you mean that you have not seen him within the last two or three days ? A. No, I have not seen him in that time.

Q. Last week ? A. No.

Q. When he was confronted with you, did he say that you had told a parcel of lies ? A. He did not say anything, but I told him that I had given all in writing.

Q. Did you say in his presence that you said you had purchased the arsenic from him ? A. Yes, I said to him, "I have admitted that I bought arsenic from you."

Q. Did he say it was all a lie ? A. Before me he did not say anything.

Q. Did he deny it ?

A. He was confronted before me, and taken away again.

Q. By whom ? A. Some officer—who it was I don't remember.

Q. Native officer ? A. Yes.

Q. Akbar Ali ? A. I do not remember.

Q. Abdol Ali ? A. I do not remember.

Q. Try and recollect. Was it Akbar Ali ? A. How can I remember just now ?

Q. Was it Gujanund Vithul ? A. No.

Q. But it might have been Akbar Ali or Abdol Ali ?

A. I do not remember. It might be.

Q. And so he was brought before you and you told him that you had purchased arsenic from him ? A. Yes.

Q. Then he was taken off to prison again ?

A. I do not know where he was taken to.

Q. He was taken away by the officer ? A. Yes.

Q. Was Goojaba brought to you ? A. Yes.

Q. By Akbar Ali ? A. No.

Q. By whom ? A. By Gujanund Vithul.

Q. Did you tell him you had told all about him ?

A. Yes. I told him that when he was sitting.

Q. Then he was taken off again ? A. Yes. He also was sent back.

Q. You have told us that you gave a bottle to Salim ? A. Yes.

Q. You knew it contained poison ? A. Yes.

Q. Was that the ants and the other ingredients you mentioned ?

A. I have already said so.

Q. You said, did you not, that the Maharaja was present at the time the bottle was given ?

The Advocate-General—He has not said that.

Serjeant Ballantine said he might be mistaken, but wished the question to be put. (Question repeated.) A. Goojaba brought the bottle with the Maharaja's permission.

President. Was the Maharaja present or not?

A. I have stated in my statement that the bottle was brought to my house by Goojaba.

Serjeant Ballantine—Was the Maharaja present when you gave the bottle to Salim?

A. I was with the Maharaja's procession, and I went down to my house and gave the bottle to Salim.

President. Cannot you say whether the Maharaja was present?

A. Maharaja was not present. I gave the bottle at my house.

Serjeant Ballantine. What did you say to Salim when you gave him the bottle? A. To take this to Rowjee.

Q. But did you tell him what Rowjee was to do with it?

A. It was not necessary to tell him. He knew it.

Q. Did you or did you not tell him? A. I did not.

Q. Did you know what it was for? A. Yes.

Q. What was it for? A. To put into water in order that blisters might be caused upon the body.

Q. Do you mean upon the body of Colonel Phayre? A. Yes.

Q. In what way? A. By throwing it into his bathing or washing water.

Q. Did you hear afterwards that Rowjee had done so?

A. No. I do not know whether he did it or not.

Q. Recall your memory and let me know when that was.

A. Do you mean the giving of the bottle?

Q. Yes. A. It was either before or after the Dusserah (24th October). I do not remember which.

Q. Did you ever hear from anybody what had been done with the contents of that bottle? A. No.

Q. You never asked? A. No.

Q. Was Yeshwuntrao constantly about the palace? A. Whenever there was business he used to come; but on Mondays and Thursdays he always came.

Q. And Salim? A. Salim also used to come for the procession, and if notes were to be brought during the interval he used to come then.

Q. Did you ever ask Salim what he had done with this bottle that you had sent out to murder Colonel Phayre? A. No.

Q. Had you no curiosity? A. No.

See Rahmatullah's Art of Cross-Examination, pp. 201—225.

For other illustrative cases, see Chapter 82 supra.

## CHAPTER 65

### In Rape and Sodomy Cases.

**Statutory Law.**—The law as regards rape is contained in Ss. 375—376 I. P. C. which are reproduced below:—

"S. 375. A man is said to commit "rape" who, except in the case herein-after excepted, has sexual intercourse with a woman under circumstances falling

under any of the five following descriptions: "*First.* Against her will. *Secondly.* Without her consent. *Thirdly.* With her consent, when her consent has been obtained by putting her in fear of death, or of hurt. *Fourthly.* With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. *Fifthly.* With or without her consent, when she is under fourteen years of age.

"Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

Exception.—Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape."

**False Charge of .—**Rape, is often set up to hide the downfall of a young girl who wishes to avoid her shame, by turning the pity and sympathy of everyone towards her; girls often enough invent attacks by quite unknown persons or, graver still, they bring false accusations against persons named. In such cases the real seducer is hardly ever accused of the rape,—he is spared—and no charge is made until the fact of pregnancy is certain. Then the woman allows herself to be seduced by a second person and the latter only is accused of the rape. Unhappily in this case the proof of the falsity of the charge can often only be made later on, at the birth of the child; the date of this shows that conception must have occurred long before the pretended rape. In such a case, therefore, one must never neglect immediately after the birth to have the child examined by experts in order to know whether or not it has attained its full terms, for as we have supposed, at the time of the pretended rape the woman was already a long time enceinte. See *Criminal Investigation* by Hans Gross, Pp. 12—15.

In olden times this offence was punishable with death. In the modern age when respect for the person and property of a subject is daily increasing and with the advance of education people are becoming more cultured it is a sad and sorry spectacle to find a woman forcibly raped.

False charge of rape may be easily set up by girls at the age of puberty. When a girl over 16 years or a woman is in question, juries are very prone to think that "there cannot be smoke without fire". Where the sexual organs, found uninjured and marks of blood on the clothes of the child were on the outside and the whole fibre of the charge was proved to be false. *Taylor's Med. Jur. 1928 at Page 130.* Women intent on revenge or extortion will frequently bring a false charge against a man, producing a tutored child as the victim. Another class of false accusation is that brought by the woman who was the consenting party until caught in the act. In such a case no injury will be found unless the woman was virgin. See *Lyon's Md. Jr. 1935 page 375.* Modern magistrates always look with great suspicion on all charge of rape unless made in a day or two after its alleged occurrence.

**Questions for Consideration of Investigator.**—There are a number of questions which should present themselves to the cross-examiner while conducting a rape case. These are as follows:

(1) *Are there certain signs of the defloration?*—To determine this question we must decide whether there are certain signs of virginity. It would be difficult if not impossible to decide whether the vagina had been dilated by penis or some other substance. See *Prem's Criminal Practice, 1947 Ed.*

(2) *Can we distinguish between defloration, the result of voluntary carnal commerce or that which is the result of violence?*

(3) *Whether one man can rape a single woman?*—It has been alleged that it is impossible that a man unaided can commit a rape on an adult female of ordinary strength in full possession of her senses. See *Prem's Criminal Practice 1947 Ed.*

(4) *Can a woman be violated without her knowledge?*—Decidedly she can be violated if under the influence of insensibility from violence, fainting narcotics or intoxication. Although it is difficult to suppose that she can be violated during sleep yet under some circumstances it seems to be possible. (1846) 2 Cox. C. C. 133 (1872) 12 Cox. C. C. 311. A prosecutrix alleged that she did not consent to the act and it was done at the time when there was a fit of hysteria. Accused was convicted. It is submitted that cases in which hysteria is pleaded should be regarded with great suspicion. See *Taylor's Med. Jur.*, page 110 (1928). Some dissolute persons take undue advantage of woman of weak intellect or imbecile nature, and thus have connection with them. In such a case if man has carnal knowledge of a girl of imbecile mind or an idiot girl and she was incapable of giving consent from the defect of understanding, accused is guilty of rape. (1859) 28 L. J. M. C. 85, (1867) 17 L. T. 295, (1846) 2 Cox. C. C. 115. In a similar case the girl was blind and wrong in her mind the accused had connections with her in her room where she was lying. The Judge told the jury that if she was in such an idiotic state that she did not know what prisoner was doing they might find him guilty of rape. But if from animal instinct she yielded to prisoner without resistance or if the prisoner from her state or condition had reason to think that she was consenting, they ought to acquit him. (1873) 29 L. T. 409.

*Whether intercourse was with consent?*—In the case of girls of over 16 years of age consent under circumstances may be presumed. But in a rape case the question of consent does not arise when the girl is too young *e. g.*, 10 years of age. 29 Cr. L. J. 12. If the circumstances show that the accused was copulating with a woman of 20 years of age with her consent and when found out in the act she naturally concocted the story of rape to save her face, it was held that the offence was not proved. 1927 L. 858. Offer of resistance determines consent. 1924 L. 669. It must be remembered that consent must not be obtained by fraud or fear. (1923) 1 K. B. 340. Where a medical man had connections with a girl of 19 years under the pretence that he was going to perform an operation which would cure her and said, "it is only nature's string that wanted breaking", it was held that he was guilty of rape because it was a case of submission but not consent to intercourse. *R. vs. Flattery*, 13 Cox. C. C. 388=3 L. T. 32; (1850) 4 Cox. C. C. 220. Sometimes it so happens that the accused is armed with deadly weapons and the woman is cowed down and does not offer any resistance. In such a case she is not a free agent and any connection with her would amount to rape. But if a grown up girl of 18 submits herself to be carried away and raped the presumption is of consent. 1931 L. 401=32 Cr. L. J. 1041. But where a father had established a kind of reign of terror in the family and his daughter under influence of dread and terror remained passive, while he had connection with her, it was held that the father was guilty of rape. (1861) 4 L. T. 154. Consent after the first act of rape does not absolve the accused. It may be the result of purely sexual urge and would not affect the first act of coitus which had already taken place against her will. A. L. R. 1932 Lahore 440 (Criminal appeal No. 353 of 1932 decided by Lahore High Court on 20-5-1932).

(6) *Whether there are marks of injury or resistance?*—The first duty of an investigating officer is to get the accused and the prosecutrix medically examined. He should also find out whether there is evidence of any struggle or resistance, *e. g.*, tearing of clothes or marks, scratches or bruises on the body or the private parts or small bruises corresponding to finger marks about the arms. Medical evidence in cases of rape may be derived from four sources. (i) Marks of violence about genitals. (ii) Marks of violence on the persons of the prosecutrix or prisoner. (iii) Presence of stains of spermatic fluid or blood on the clothes of the prosecutrix or prisoner. (iv) The existence of *gonorrhoea* or syphilis in one or both. See *Taylor's Med. Jur.*, 1928, page 111. Bruises and laceration of the external



genitals may be present with redness, swelling and inflammation. It may be noted that refusal of a woman to be medically examined is no evidence against her. No presumption can be drawn against her from this fact. 1935 Nag. 69, (1904) 68 J. P. 327.

*Whether there is corroboration of girl's testimony?* :—The consensus of opinion throughout the world is that conviction on the uncorroborated testimony of a woman should not be sustained. The value of the testimony of the prosecutrix depends a good deal upon her position and her conduct, for instance, if she is of good fame and made an outcry and resisted, then her story should be believed even if there is slight corroboration. But if the place where the act is alleged to have been committed is where it was possible she might have been heard and she made no outcry, it carries a strong but no conclusive presumption that her testimony is false or feigned. Resistance is the best corroboration, *e. g.*, tearing of clothes infliction of personal injuries, 25 Cr. L. J. 1274. But where a woman had intercourse with some person but showed no signs of force it was not sufficient corroboration. 27 Cr. L. J. 1284. What the prosecutrix said to others is no corroboration of her evidence. 62 C. 527, 35 C. L. J. 508, (1916) 2 K. B. 658. If a girl repeats the story to 25 persons then there will be 25 corroborations. But the law does not attach any importance to such corroboration. She cannot corroborate herself by repeating the story to several persons. (1929) 98 L. J. K. B. 67.

*Whether the discharge from the private part of a girl is due to a disease?*—Some girls on nearing the age puberty have purulent discharge from private parts which is mistaken by some as the result of a connection with some person. Dr. Dewees of Philadelphia has given an excellent account of marbel discharge under notice in his treatise on the physical and medical treatment of children. See *Rayan's Med. Jur.* Pp. 318—320

**Medical Examination of Accused.**—It is absolutely necessary to get the accused medically examined, for more than one reason; firstly, it is possible that some nails marks indicating resistance may be found on his person, or he may have contracted gonorrhoea or syphilis from the woman, or seminal stains may be found on his person or clothes or there may be marks of violence about the genitals; secondly it may turn out that the accused is impotent and physically incapable of committing rape. Thirdly, the white substance (smegma) round the genital may indicate that no intercourse took place within 24 hours or so. This point was stressed by the Allahabad High Court in a case where accused was not medically examined and therefore acquitted. 1946 A. 191, 1944 N. 245.

**Clues or Traces of Crime.**—The following are certain clues or traces of crime. (1) Whether the places of crime is a deserted place or surrounded by inhabited houses? (2) Whether the cries of the raped girl could reach some one from the place of the crime? (3) Whether there are any marks of injuries on the person of the accused or on the victim? (4) Whether there are any nail marks on the hand of the accused or under the arms? (5) Whether there is tearing of clothes or breaking of trouser string? (6) Whether there is communication of gonorrhoea or syphilis by one party to another? (7) Whether the girl made immediate complaint about the occurrence to her relatives? (8) Whether the prosecutrix has got good character or is of immoral character? (9) Whether the girl is physically stronger than the offender? (10) Whether the accused is suffering from impotency or physical incapacity? (11) Whether the woman is healthy or of imbecile or idiotic nature? (12) Whether seminal stains are found on the trousers or *pajamas* of the woman or on the clothing of the accused? (13) In the case of young unmarried girls whether hymen was ruptured?

**Essentials and Evidence of Rape.**—In case of rape, evidence of the complainant must be corroborated. Where accused denies the offence, the corroboration may consist of injury on the private parts or other parts of the body occasioned by the struggle, seminal stains on her clothes or the clothes of the accused or on the place of occurrence. Her subsequent conduct has to be considered as well. 1942 B. 121=43 Cr. L. J. 621, (F. B.) 1944 N. 245 Consent of the woman is the chief defence. A sleeping woman can never consent (1878) 14 Cox. C. C. 114. The English law that a boy under fourteen years of age is incapable of committing rape does not apply to India. 37 A. 187. If the girl is less than fourteen years of age her consent is immaterial. 1930 C. 437=32 Cr. L. J. 455, 18 C. 49, 3 P. 410. It must be proved that there was penetration even though partial. 1927 L. 222=28 Cr. L. J. 244, 1927 L. 735=23 Cr. L. J. 241. The report of chemical analyser regarding the presence of semen on the complainant's clothing is not sufficient to prove that the complainant is actually raped. 7 L. 484, (1927) 29 Cr. L. J. 248. Complaint of prosecutrix is admissible as corroborating her credibility. 1944 N. 245. In case of rape of child, corroboration as to identity of accused is not necessary, 1944 N. 863. For complete law on the subject, see *Prem's Criminal Practice 4th Ed.* (1840-1947) by the Author.

**Corroboration of Girl's Testimony.**—Corroboration of complainant's evidence in rape case must be dealt with as the corroboration of an accomplice. 1942 B. 121=43 Cr. L. J. 621 (F. B.), 1933 C. 883=62 C. 534. The corroboration must be independent evidence. 1944 N. 245. (1905) 1 K. B. 551, (1925) 19 Cr. App. Rep 40. A girl cannot corroborate her-self by repeating the story to 25 persons. Thus there will be 25 corroborations. 1929, 98 L. J. K. B. 67, (1908) 2 K. B. 650.

**Are there Certain Signs of Defloration?**—To determine this question, we must decide whether there are certain signs of virginity. We have to refer to anatomical and obstetric works, for a description of the external genital in a virginal state, to enable us to form a correct decision upon this question. The external genital organs are those connected with the subject; and a description of them is necessary. In virgins, the external labia are thick, firm, elastic, and internally of a vermilion or rosaceous colour, their edges in apposition, so as to close completely the orifice of the vulva. They are soft, pale, and separated in women accustomed to venereal enjoyment or subject to leucorrhoea, or who have practised masturbation. But these characters are not to be depended on as women of strong constitutions may have the signs of virginity; and virgins exhibit the latter signs from leucorrhoea, or fluor albus. In fact, no positive conclusion can be deduced from the state of the external or internal labia.

**Un-natural Offence.**—The unnatural offence consists in carnal intercourse committed against order of nature by man with man or in some unnatural manner with woman or by man or woman in any manner with beasts. Buggery, from Italian *buggerare*, is a carnal copulation against nature. It was punished with burning some say burning alive, but it is now punished with transportation for life or with imprisonment of either description for a term which may extend to 10 years and accused is also liable to be fine. See, 377, Penal Code.

**Evidence of Sodomy—Corroboration.**—It is unsafe to convict an accused on the uncorroborated testimony of the person on whom the sodomy is committed unless for special reason his evidence is entitled to special weight. 19 Cr. L. J. 946=73 P. L. R. 1918; Blackstone (1192-A).

Blackstone properly observes that it is a "crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged and the negative so difficult to be proved, that the accusation should be clearly made out, for if false, it deserves

a punishment inferior to the crime itself." Ryan's Med. Jur., 1836. If there is no corroboration of the boy's evidence of identity, conviction must be set aside. (1942) 1 All. Eng. R. 203; (1916) 2 K. B. 658. Evidence of young accomplice requires corroboration. (1924) 2 K. B. 300. (1913) 9 Cr. App. Rep. 232, 142 L. T. 383. A charge under section 377, I. P. C. is one very easy to bring and very difficult to refute. The evidence must be very convincing. 1926 L. 375. In a charge of sodomy stains of semen constitute important evidence. The report of the Chemical Examiner must be given great weight. 10 L. 794=1930 L. 318. It must be remembered that the consent of the victim is immaterial. He is guilty of abetment. Similarly if a married woman consents to her husband committing an unnatural offence with her, she is an accomplice. (1938) 8 C. & P. 604. For other cases on the subject, see *Prem's Criminal Practice 4th Ed. (1840-1947)*.

There are certain women who are vested by shrewd cross-examiners but such women are rare. When they fall they fall ignominiously. A young servant girl instituted criminal proceedings against her master for committing rape on her. The mother gave evidence for the prosecution to the effect that soon after the act of intercourse the daughter made complaints to her and had shown her a chemise ripped in struggle. In rape cases tearing of clothes and other evidence of struggle is generally conclusive. So this was a very important piece of evidence because it negated the defence of consent. The cross-examiner questioned the mother on the theory that the so called rape might have been a source of additional income for the servant girl. The cross-examination proceeded thus :

Q. When your daughter told you the details of the attack what did you say? A. Say, what could I say?

Q. I suppose you were very angry, weren't you? A. Of course I was.

Q. But what did you say? A. I asked her if her master had given her anything?

Q. Meaning money? A. Of course.

Q. What did she say? A. She said, no.

Q. What did you say to that? A. I said, "More shame to him, then he certainly ought to be locked up!"

If on the other hand the lawyer had questioned the mother by asking "when your daughter told you the details of the attack, what did you say," she would have proceeded to tell the jury in complete detail, in no uncertain terms, all sort of things and would have denounced the master completely.

## CHAPTER 66

### In Riot Cases

In riot cases, the witnesses on either side are generally those who took part in the riot. It is very difficult to get uninterested witnesses in such a case. In communal riots it is almost impossible to get impartial witnesses. Hence it has been held that in communal riots it is unsafe to convict on the evidence of one witness alone, unless there is satisfactory circumstantial evidence. 1933 A. 834: 55 A. 639, 1933 A. 314: 34 Cr. L. J. 689, 1933 A. 401: 34 Cr. L. J. 765. In cases under S. 147, Indian Penal Code, where the evidence of the prosecution is all interested and inimical, it is necessary to scrutinize it very carefully. 1927 L. 617: 28 Cr. L. J. 685. The safe and sure guide for arriving at the truth is to find out if some of the accused have got marks of injuries on their persons; because in riot cases evidence is generally perjured and motive cannot be ascertained. 1931 A. 439

1931 A. 712, 1934 A. 881, 107 P. L. R. 1916. Generally both parties are put up before the Magistrate for rioting. In the case of two cross-cases of rioting the trial should proceed simultaneously and both cases should be disposed of at one and the same time. 20 C. 537. In riot cases discrepancy between evidence of certain eye-witnesses must occur. The eye has capacity to see many objects at one time. When in the presence of numerous objects, it may not see all, but it will of necessity see a great number of them. A man looking at a crowd of people necessarily sees at once many persons in it, although probably he will see only a few distinctly and the rest after a confused manner. See Ram on Facts, Chapter II. Of the assemblage of images, which the human mind collects from all nature, the least clear and evident are those which are explored by reason and argument: the more evident and distinct are those which are formed by the impressions made by external objects on the senses and of these the clearest and most vivid are those which are perceived by the eye. Hence poetry abounds most in those images which are furnished by the senses and chiefly those of the sight, in order to depict the obscure by the more manifest, the subtle by the more substantial. Lowth's Lectures on the Sacred Poetry of the Hebrews, Part II, S. V. p. 67, Ed. 1847. In the case of a riot or tumult, especially if sudden, it naturally happens that the minds of many, perhaps of most persons present are very much confused and observe nothing distinctly. Their minds are rapidly withdrawn from one object to another, so that they observe the scene rather in one mixed and indistinct mass, than in separate defined portions. They look here and there on this side and that, in turn see different parts of what is going; and there is very little that separately from the mass, makes such impression on their minds. Ram on Facts, Chap. II.

In the crowd, however, there may be same persons, who have composure enough to prevent their minds being distracted by a multiplicity of objects and can confine and fix their attention to particular matters only. And when the eye of the spectator has been attracted to some one thing, he may, for any special reason, as, for instance, an interest he takes in what some present may say or do, fasten his attention on this particular object to the exclusion of others calculated to excite his notice. But in the absence of any such cause of exclusive attention, the objects which will most attract the eye will naturally be those which are the most prominent in the scene. And it is certain that during a riot or tumult it is quite impossible for any one person to see distinctly all that takes place; since while he is looking in one direction something else will surely be going on in another and as different people may see different things, so this thing may escape the notice of one person and that of another. Ram on Facts, Chap. II. People who have in the course of a riot received a number of slight wounds and one severe wound are generally incapable of telling when they received the severe one. Further, such wounded persons cannot, as a rule, state exactly how they received the blows. In short, the statements of wounded people, whenever the sense of touch is involved, must be received with great caution. Dr. Hans Gross, Criminal Investigation, p. 70.

In the famous Bombay Tower of Silence Case, a number of persons were put on trial for assembling together with a common object of committing mischief, viz. to destroy Chul and tents and thereby committing an offence of being members of an unlawful assembly. They were further charged with the common object of enforcing the supposed right of the possession of a certain piece of land by use of criminal force. The case was conducted by eminent counsels, i.e., Messrs. Ferguson and Inverity were for the prosecution and Messrs. Austey, Pheroze Shah, Starling, Cragie,

Lynch Owen defended the accused. The cross-examination of the Police Officers and other eye-witnesses was very lengthy and effective. It is very instructive and the reader is referred to "Principles and Precedents on the Art of Cross-Examination" by P. R. Aiyar.

## CHAPTER 67

### In Suits for Damages for Accident in Railway or Omnibus.

It is a common occurrence, that passengers sustain injuries by the negligence of servants employed by railway or omnibus companies. Sometimes the question becomes difficult, as there is some evidence of contributory negligence as well. The law relating to Railway may be summarized thus :—

#### Injury to Passengers by Negligence of Railway.

If any inconvenience or danger is caused by the negligence of the railway company, a passenger may lawfully attempt to get rid of it, provided in doing so he runs no obvious risk, and is not himself guilty of any negligence. If in such attempt he is injured, the company is liable in damages 24 B. 1. The onus of proving the company's negligence lies on the plaintiff but the onus of proving the passenger's negligence is on the railway company. 24 B. 1. It is the duty of the railway company to see that the doors of the carriages are properly shut. Leaving the door open or unfastened amounts to negligence on the railway company for the consequences of which the railway is liable to the passenger, though the fact of the door being open is not conclusive proof of negligence. 24 B. 1, 12 Bom. L. R. 78, 41 A. 488. Omission to have a railway station properly lighted will give rise to a presumption of negligence. 1924 M. 154.

It is not enough that the lights on the railway station should be sufficient for the railway company and their own servants who know the premises, but they must also be enough to guide and direct strangers who are unacquainted with the station. 9 W. R. 73. Plaintiff was sleeping on one of the lower berths which carried a ladder that passengers might require for getting on to the upper berth. One of the passengers folded the ladder, and kept it in a rack near the roof of the compartment. The ladder fell on the plaintiff's head and caused him injury. The railway was not held liable for damages. 1924 B. 278 : 25 Bom. L. R. 831. A passenger, while going to the urinal at a railway station when all the lamps had been extinguished and there was complete darkness, fell down in the urinal in a deep pit and sustained injuries. Held, that the railway should protect dangerous places on the platform by erecting walls around them, and cannot keep the place in total darkness. The railway cannot say that the passengers who were waiting for trains which are late walk up and down the platform at their own peril. 1924 M. 154 : 45 M. L. J. 424. To stop a train with sudden and violent jerk is a negligent act on the part of the railway, (1921) 125 L. T. 472, and if a person gets injured in consequence of such jerk, the railway will be liable for damages. 18 W. R. 694 (Eng.)

Mere over-shooting even with an invitation to alight is not necessarily by itself negligent. 7 Bom. L. R. 119. Plaintiff sustained injury when alighting which had over-shot the platform. It appeared that the plaintiff alighted on the implied invitation of the railway where the train stopped, and there were no lamps and no warning was given to the plaintiff that the train had passed the platform. Held, he was entitled to damages. 31 B. 381 (P. C.) Although a railway company are liable for injury caused by their negligence, yet, if they can prove that the plaintiff was himself guilty of negligence which was the

immediate cause of the injury, they will not be liable, as plaintiff is guilty of contributory negligence. 47 M. L. J. 887. Where the passenger was travelling with his arm projecting out of an open window and was injured by the open door of a stationary train on the up line of the station, it was held that the plaintiff was guilty of contributory negligence and was not entitled to damages. 37 B. 575 : 12 Bom. L. R. 78.

A passenger must travel inside and not outside the compartment. If he travels outside and gets injured, the company is not liable. 34 B. 427. A girl of 7 years, while crossing a railway line with a bundle of grass was run over by an engine and lost her right arm, and right leg. The evidence showed that the engine driver did not see the child and the fireman saw the child only at a distance of 4 and 5 feet from the engine. It was also in evidence that the people living in the neighbourhood were in the habit of crossing the railway authorities; held, that the company was not liable. 48 M. 417.

If a person crosses the railway line he must take utmost caution. The plaintiff will be guilty of negligence in not keeping a sharp look out for passing engine. The plaintiff was only a licensee if not a trespasser, and under the law the defendants could not be liable unless they had placed any trap. 48 M. 417.

In the cases of accidents by crossing the line, if both parties are negligent, it is the party who is last negligent that is made responsible for the same. 48 M. 417. Where the railway train ran into and damaged the plaintiff's carriage while crossing on the level crossing, the company was liable in damages as the gate was left open. 41 C. 308.

If a person attempts to enter a carriage while it is in motion, he does so at his own risk, and the company will not be liable for the resulting injury. 35 B. 478.

Where children used to play on a timber pile and one of the children was run over by a train it was held that they were licensees so far as the timber pile was concerned, but there was no invitation or leave to go on to the main line. 48 M. 417.

A passenger, seeing that his compartment became greatly over-crowded, stopped the train by pulling the communication chain, whereupon the driver and the guard got down from the train, pulled the passenger out of the compartment and slapped him, and handed him over to the police. The passenger filed a suit against the railway for damages. Held, that the company was not liable for the assault committed by its servants in the course of arrest, because company had no authority under s. 108, Railway Act, to arrest for the offence of pulling the communication chain. 43 B. 103.

In assessing damages for injury, three items are to be considered, i.e., expenses, pain and suffering, and loss of income, past and prospective. 38 B. 552, 1924 B. 278.

Where a passenger had some currency notes about him at the time of the accident, the loss of such notes could not be the cause of action against the railway as it was only a remote result of the accident. 38 B. 552, 1924 B. 278, 1925 L. 636 : 6 L. 451.

Railway is liable only for those results which immediately flow out of its wrongful act. 1925 L. 636 : 6 L. 451. No sentimental consideration should influence the Court in assessing damages. 1927 A. 684 ; 52 C. 602. The expenses of the funeral of the deceased cannot be taken into account in assessing

compensation. 16 B. 254 *but see* 52 P. R. 1914. The proper way of finding out the financial loss to the plaintiff is to form some estimate of what the value of the continued life of the deceased would have been to the plaintiff. 1926 N. 271, 1933 M. 565. Where a person loses his life as a result of an accident, the value of his life does not depend on the number of the dependents but on his earning capacity, 1926 A. 703 : 1922 C. 317. Where the sole source of income of the deceased was cultivation by personal labour, the probable duration of the capacity of the deceased to supply labour for the cultivation must be taken into consideration while assessing damages for his debt, 1927 A. 684.

### Injuries to Persons—Contributory Negligence.

Although a railway company are liable for injury caused by their negligence, yet if they can prove that the plaintiff was himself guilty of negligence which was the immediate cause of the injury, they will not be liable as plaintiff is guilty of contributory negligence, 47 M. L. J. 887. Where the passenger was travelling with his arm projecting out of an open window and was injured by the open door of a stationery train on the up line of station, it was held that the plaintiff was guilty of contributory negligence and was not entitled to damages. 37 B. 575, 12 Bom. L. R. 73.

### Liability of Railway for Negligence of Servant.

Where certain railway clerks exceeded their authority in accepting boxes containing fireworks for despatch by passenger's train, but which could not be sent by passenger train, the company is bound to despatch it by goods train, with all reasonable speed and is not entitled to charge a higher rate. 43 A. 623. Where lower rate was charged by the booking clerk than that mentioned in the tariff, the railway company cannot demand charges at the tariff rate at the destination because the consignor was not responsible for the clerk's mistake. 1932 A. 540 : 54 A. 557 : 138 I. C. 439.

### Lighting of Railway Station.

Omission to have a railway station properly lighted will give rise to a presumption of negligence. 1924 M. 154. It is not enough that the lights on the railway station should be sufficient for the railway company and their own servants who know the premises, but they must also be enough to guide and direct strangers who are unacquainted with the station. 9 W. R. 73. A passenger while going to the urinal at a railway station, when all the lamps had been extinguished and there was complete darkness, fell down in the urinal in a deep pit and sustained injuries. Held, that the railway should protect dangerous places on the platform by erecting walls around them, and cannot keep the place in total darkness. The railway cannot say that the passengers waiting for trains which are late walk up and down the platform when waiting for the train at their own peril. 1924 M. 154 : 45 M. L. J. 424. Plaintiff sustained injury when alighting from carriage which had over-shot the platform. It appeared that the plaintiff alighted on the implied invitation of the railway where the train stopped, and there were no lamps and no warning was given to the plaintiff that the train had passed the platform. Held, he was entitled to damages. 31 B. 581 (P. C.).

### Illustrations.

(i) Lord Birkenhead was a wizard of a lawyer. He was retained by defendant in a suit brought by a young man, for damages for accident in a railway collision. Plaintiff alleged that he had damaged his arm to such an extent that it had become absolutely useless. His cross-examination proceeded as follows :—

Q. Well, young man, you say that your arm has become absolutely useless after the accident. Will you show to the jury how high you can lift your arm?

A. Yes; (The plaintiff lifted his arm about four inches with groans and complained of acute pain).

Q. I am very sorry to have troubled you like that. But it was quite essential to assess the damages. Now will you show to the jury how high could you raise your arm before the accident so that exact amount of damages could be ascertained? (The question was so rapidly put that the plaintiff did not realize the import of it and at once raised his arm upward over his head, at full length).

A. This much.

This settled the case for the plaintiff. It was obvious that he was only pretending.

(ii) In a suit for damages against an omnibus company for running over the plaintiff, cross-examination proceeded as follows:—

Q. "Now, Sir, isn't it a fact that every single share-holder in the company is a nominee of your own?" A. "Perhaps—but—"

Q. "Answer the question. Yes or no. You say 'Yes.' Now let me ask: Was not every penny-piece of the director's 'qualification' found by you?" A. "Yes."

Q. "I put it to you, that so far from its being the fact that our omnibus ran into you, it was you by your gross carelessness ran into the omnibus." See 20 M. L. J. 226.

(iii) A person brought an action against a railway company for damages for injuries received through falling between the platform of a station and the steps of a railway carriage, alleging that the company were negligent in allowing such a space to exist—about one foot. The case for the company was that the platform and the step were safely constructed, and that the plaintiff was himself guilty of negligence in not taking care when he left the carriage.

The plaintiff was cross-examined:—

Q. "You say you left the carriage carefully when the train was as a stand-still, and it was daylight?" A. "Yes."

Q. "Then how was it that you came to miss the step?" A. "It was too narrow."

Q. "You think it should have overlapped the platform?" A. "Yes, or been nearer to it."

Q. "Do you know that thousands of persons have used that platform daily since 1870?" A. "Perhaps."

Q. "And that no accident has been traceable to the station or the carriage?" A. "Perhaps."

The next witness was a surveyor, who swore that a distance of a foot between the step and the platform was dangerous.

Cross-examined:—

Q. "What experience have you of railway?" A. "Well, I am share-holder in one or two."

The other witnesses were left severely alone.

The jury found for the defendant. See 20 M. L. J. 225.

(iv) Some two years ago I was in New York City, overlooking the taking of some depositions in the case of a lady who had instituted a damages suit against the railway company by which I was employed. She lived in Tennessee,



and was travelling through Virginia. There had been a heavy rain that had washed a lot of sand down upon the track. The locomotive ran upon this sand and quietly and sweetly turned over. Nobody was hurt so far as we could tell except this lady. From many years she had been under treatment for some ailment to one of her limbs. She was on the way to her specialist in New York then for further treatment of this limb. It was the deposition of this specialist that we were taking. Our counsel in charge of the case was conducting the cross-examination. Our counsel went on and developed her condition before as being very similar to that in which she was at present, in the fact that she had been on her way to her doctor for treatment at the time of the accident complained of. The witness testified all right as to what the condition of this good lady was; our counsel turned to me by way of consultation and said in a low voice.

'The other side did not ask him whether or not her present condition is due to the turning over of that car, or whether it was due to the old ailment. Shall I ask him?'

'No, do not do it.'

'Yes,' he said, 'I think I had better; I think I shall. I believe that will end the law suit.'

'So do I,' I replied.

'Well,' said he, 'he is obliged to say it; he is obliged to say it.'

'Remember he is her doctor, he has been getting her money. I believe it a fine question to ask, but I would sooner ask it of the jury. The jury cannot explain it like that doctor can.' But still he insisted.

'Well, I will take the responsibility,' he added:

'Very well, you are incharge. Ask it and then will come to deluge,' I told him.

So he asked the question and the doctor said:—

'Yes, she had that ailment, but I thought she was completely cured of it. She was so severely shaken up in this accident that it has turned the whole thing loose worse than ever.'

That was a fine question, a very learned question. It was a costly question for I turned back home and paid her £10,000 damages." 14 Cr. L. J., p. 28.

(v) One Mr. Brown was suing for damage for injuries, and was being cross-examined by Duke, K. C.

Q. "I gather that you did not see nor hear the approaching vehicle?" (N. B.—It was a grocer's cart). A. "Not I. Why the first thing I see or hear was the wan a-top of me. I was being scrunched before I knew where I was."

Q. "I understand. You say you neither saw nor heard the approaching vehicle?" A. "That's right. Not I—never at all," the witness said pleasantly.

Q. "You were overtaken opposite the post office, I believe?" A. "Yes, I was in the middle of the road."

Q. "What were you doing that you did not see or hear the approaching vehicle?" A. "Nothing, look here."

Q. "Answer my question, please." A. "Well, but look here, Guv' nor."

Q. "Answer my question, please," A. "Nothing, but having a bit of a lark with one or two others,"

# IN SUITS FOR DAMAGES FOR ACCIDENT IN RAILWAY OR 385 OMNIBUS

Q. "Having a bit of a lark? Do you mean, you were dancing on the pavement?" A. "Perhaps I was, perhaps I wasn't."

Q. "Were not you dancing on the pavement with a young lady when the vehicle came round the corner thirty yards away?" A. "Perhaps I was, perhaps I wasn't."

Q. "And didn't the young lady run away from you?" A. "I don't say nothing."

Q. "And did not you run after her and so into the vehicle?" A. "Perhaps."

Q. "Answer the question please." A. "Well, what right had the cart to be there, I ask?"

Counsel—"The jury will tell you—thank you." 20 M. L. J., pp. 227-228.

(vi) This was an action for damages against a Tramway Co. The wife of a respectable builder in the country was on a visit in London. A tram-car, which she hailed, had stopped. As she was getting on the platform at the entrance of the car, the driver started the car, which went on with a jerk, and the lady unable to retain her footing with one foot on the ground and the other on the platform, was thrown down with considerable violence.

She was taken to a surgery, where she fainted, and was afterwards conveyed to her lodgings. There she remained under medical treatment for several weeks.

After returning to her home in Yorkshire she became worse, and was attended by a local doctor. He saw at once that she was suffering from a broken rib. This fact he communicated to the manager of the Tramway Co. Their "Medical adviser" ridiculed the idea of a broken rib, although the local doctor had stated in his report that if the Tramway's "Medical adviser" would come down, he could ascertain the fact without difficulty, and that he could hear the rib was broken when the patient breathed. The medical gentleman, however, of the Tramway Co. was perfectly certain without any examination that the rib was not broken, and for this most satisfactory reason that if it had been, he must have discovered it. Other doctors for the Company were also prepared to give evidence for the Company that "it was impossible for a rib to be broken and not to be discovered on the first examination." The reader will bear this in mind, as it will be of some importance at a later stage.

The local doctor desired the Company's medical officer might be sent down, so as to prevent it being said that it was a "hole-and-corner examination." They refused, however, to do so. Having examined the injured woman, they were quite sure that if the rib had been broken they must have discovered it.

The issue was simple enough. Did the car start without allowing the woman time to get in?

The cross-examination should have been directed to that issue; but the Tramway's counsel thought otherwise. His first question was:—"Did you not at one time keep a greengrocer's shop?"—Intended to show that greengrocer's rib was not of so much value as a builder's. That first necessity of an irrelevant question is that it should be harmless; the second, that it be useful. This, as the reader sees, was neither the one nor the other.

The answer was: "Never."

This next question was equally damaging to the defendants.

Q. "Has not your husband mortgaged his house?" A. "Not that I know of. I never heard of it, if he has."

Q. "Be careful, madam ; you are on your oath. Has not your husband mortgaged his house ?" A. "I have said I have never heard of it."

Q. "Do you keep the books, madam ? Now, be careful." A. "Keep the books ?" she said.

Q. "That is my question." A. "Do you mean his trade books ?"

Q. "Do you keep the books ? was my question. Answer it, madam,"

A. "I keep the rent books and let the houses."

Q. "Has he got any houses, madam ? Take care ; you are on your oath." A. "Certainly he has."

Q. "Why ; has he not applied for donations to a friendly society because he was hard up ?" A. "I never heard of such a thing."

Q. "Will you swear that, madam ?" A. "I have sworn it."

All this, it may be noted, has nothing to do either with the broken rib or the starting of the car without giving the lady time to get in.

The next important witness was the local doctor. His evidence was merely as to the injuries. He might have been let alone without much harm. But he was subjected to the same 'severe' kind of cross-examination as everybody else was who went into the witness-box.

Q. "Will you swear, Sir, that a rib was broken ? On your oath, Sir ?" A. "Most certainly," answered the doctor.

Q. "How did you test it ?" A. "It required little testing, You could hear it."

Q. "Will you swear that ? Now, be careful, Sir ; we have doctors here."

A. "Yes ; but they did not come to examine the plaintiff when I urged the Company to send them."

Counsel :—"I did not ask you that, Sir. Confine yourself to answering my questions, please."

That is proper advice, no doubt ; but questions sometimes have a wide range, which cannot be contracted after they are asked. The time to limit them to the exact answer you wish is before you ask them.

Q. "You have been in trouble, haven't you ?"

A. "Trouble ?"

Q. "Oh, you know what I mean. Come now, haven't you been in trouble ? Were you not charged with indecently assaulting a girl ?"

These were the learned counsel's "instructions."

The witness, overwhelmed with anguish, admitted it. But matter was soon set right. The doctor broke down in the witness-box ; but the Judge came to his relief, and ascertained that many years ago a false blackmailing charge was made against him by a dissolute girl, to whom he had gratuitously rendered service, but it had been at once cleared up : the doctor was proved to have been innocent of the charge ; and, retaining all his appointments in the town, retained also what was more valuable : the respect and esteem of all who knew him.

Such an attack on his character and his professional honour had its effect upon the Jury, and there was no need to call further evidence. They showed their opinion in damages, not in the expression of their sympathy for the doctor. See Harris, pp. 55—60.

(vii) This was a suit for heavy damages against a railway company for injury caused to the plaintiff, a woman, while travelling in the Railway car. Expert physicians swore that the plaintiff had a lesion of the spine and was suffering from paralysis as a result of the accident. According to the testimony

of the doctors her malady was incurable and permanent. The records of legal department of this railway company showed that these same men testified to the same state of affairs in the case of a Mr. Hoyt's against. He too was alleged to be suffering from an incurable lesion of the spine and would be paralyzed and helpless for the balance of his life. The records of the company also showed that Hoyt had recovered his health promptly upon being paid the amount of his verdict. At the time of the present trial, Hoyt had been employed by H. B. Claffin & Co. for three years. He was working from seven in the morning until six in the evening lifting heavy boxes and loading trucks.

The moment the physicians had finished their testimony in the cases, this man Hoyt was sub-paenaed by the railroad company. On cross-examination, these physicians both recollected the Hoyt case and their attention was called to the stenographic minutes of the questions and answers they had given under oath in that case. They were then asked if Hoyt was still alive and where he could be found. They both replied that he must be dead by this time, that his case was a hopeless one, and if not dead, he would probably be found as an inmate of the public insane asylums. At this stage of the proceedings Hoyt arrived in the Court-room. He was requested to step forward in front of the Jury. The doctors were asked to identify him, which they both did. Hoyt then took the witness-stand himself and admitted that he had never had a sick moment since the day the Jury rendered a verdict in his favour; that he had gained thirty-five pounds in weight, and that he was then doing work which was harder than any he had ever done before in his life; that he worked from early morning till late at night; he had never been in an insane asylum or under the care of any doctor since his trial; and ended up by making the astounding statement that out of the verdict rendered him by the Jury and paid by the railroad company, he had been obliged to forfeit upwards of £ 1,500 to the doctors who had treated him and testified in his behalf. The result was a verdict promptly in favour of the railroad company. See Wellman, pp. 98-94.

(viii) This was a suit brought on behalf of the next-of-kin, to recover damages for the death of one John McQuade who had fallen from a surface railway car and had broken his wrist so that the bone penetrated the skin. This wound was slow in healing and did not close entirely until some three months later. About six months after his accident, McQuade was suddenly taken ill and died. An autopsy disclosed the fact that death resulted from inflammation of the brain and the effort of the expert testimony in the case was to connect this abscess of the brain with the accident to the wrist which had occurred six months previously. The expert doctor who had never seen McQuade in his life-time, gave it as his opinion that the broken wrist was the direct cause of the abscess in the brain, which in turn was due to a germ that had travelled from the wound in the arm by means of the lymphatics up to the brain where it had found lodgment and developed into an abscess of the brain, causing death. The contention of the railway company was that the diseased condition of the brain was the result of a cold or exposure, and in no wise connected with the accident; and that the presence of the large amount of fluid which was found in the brain after death could be accounted for only by this disease. During the cross-examination of this medical expert, a young woman, wearing a veil, had come into Court and was requested to step forward and lift her veil. The doctor was then asked to identify her as a Miss Zimmer, for whom he had testified some years previously in her damages suit against the same railway company.

At her own trial Miss Zimmer had been carried into the Court-room resting in a reclining chair, apparently unable to move her lower limbs, and this doctor had testified that she was suffering from chronic myelitis, an affection of the spine, which caused her to be paralysed, and that she would never be able to move her lower limbs. His oracular words to the jury were "Just as she is now, gentlemen, so she will always be." The witness's attention was called to these statements, and he was confronted with Miss Zimmer, now apparently in the full vigor of her health, and who had for many years been acting as a trained nurse. She afterwards took the witness-stand and admitted that the Jury had found a verdict for her in the sum £1,500 and that she had ever since earned her livelihood as a nurse. *See Wellman*, pp. 91-95.

(ix) In a trial for personal injury case, the defence was that the plaintiff was in an extraordinary hurry at the time of the accident and therefore his conduct amounted to an act of contributory negligence. The plaintiff who was a handsome young woman was injured by a taxi cab while attempting to cross the street. The defence counsel did not put a direct question to her whether she was in a hurry at the time of the accident. If he had done so, the answer would have been in the negative and would have proved disastrous to his client's case. The cross-examination proceeded as follows:—

Q. When you got off the street car, were you alone? A. Yes.

Q. What time was it? A. 11-30.

Q. At night? A. Yes.

Q. Was the street dark? A. Yes.

Q. And cold? A. Yes.

Q. Were there many people about? A. No.

Q. That is a rather deserted neighbourhood at that time of night.  
A. Yes.

Q. How far is it from where the car stopped to your home? A. Ten blocks.

Q. Did you expect to get up early next morning? A. Yes.

Q. So that after you got off that street car you wanted to get home just as quickly as you possibly could, didn't you? A. Yes.

Thus the counsel succeeded in establishing a number of collateral facts. He brought out the fact that she was alone that late night, that the street was dark, cold and deserted. That she had ten blocks to walk and in that she was to get up early next morning. The Jury had no hesitation in coming to the conclusion that in fact she was in hurry at the time of the accident. In doing this, she gave the impression of the Jury about contributory negligence which the defence witnesses were ready to corroborate.

## CHAPTER 68.

### In Suits for Breach of Promise of Marriage.

It is generally seen that in a suit for damages for breach of contract of marriage, the girl or her parents always exaggerate things to a large extent in order that they may recover the maximum amount of damages from the defendant. The evidence of the girl requires careful scrutiny. It requires great tact to handle such a witness. A woman has always an advantage of our counsel. The lawyer is bound by every law of decency, policy and manner to treat her with utmost consideration. But sometimes she is too clever for a lawyer. In an action for breach of promise to marry, the defendant is entitled

to prove that the plaintiff is a person either of bad character or of coarse and brutal manners. *See Taylor, S. 358.*

The following decisions will be found useful :—

A contract was entered into between two Hindus that the daughter of the one would be given in marriage to the son of the other. The contract was broken. Damages of two kinds will naturally result: (i) the pecuniary loss, if any, and injury to the feelings and prospects to the bride and bridegroom personally, (ii) the pecuniary loss and the loss to the credit and reputation of the family of the injured party. 1937 M. W. N. 1274. A suit by the father of the bride for damages suffered by him as head of the family and as father of the bride is not strictly an action for breach of the promise of marriage. S. 73 must be applied to the case. 1937 M. W. N. 1274. In case of breach of contract of marriage, a claim to recover an amount by way of increased expenditure on the bride's subsequent marriage alleged to be due to her having been discarded cannot be allowed, because the increased expenditure does not naturally and directly arise from the breach of the first marriage, and is generally too remote a consequence. 1937 M. W. N. 1274. Money advanced on the faith of a promise to give a girl in marriage or settling a marriage can be recovered in case of breach of contract. 10 C. 1054, 1934 L. 544 : 152 I. C. 913, 7 P. R. 1880, 1 C. L. J. 261, 1923 N. 296 : 74 I. C. 107, 14 W. R. 154. In case of breach of contract of marriage Court will allow refund of money as well as compensation. 1934 L. 544 : 152 I. C. 913. Where a contract of marriage is not performed, property gifted or money paid under it can be recovered back. 16 B. 673, 7 Bom. H. C. R. 122, 65 I. C. 81 (C.), 10 C. 1054, 1928 N. 89 : 106 I. C. 803, 1 C. L. J. 261, 113 P. R. 1919, even though the plaintiff himself broke the contract by refusing to give the bride in marriage. 41 M. 197.

If the marriage has been solemnized, the money cannot be recovered by suit. 32 M. 185, 1926 P. 582 : 5 P. 646 : 99 I. C. 782.

Where plaintiff advanced money to the defendant in consideration of his daughter's betrothal and *fiance* died, the suit for refund of money is not maintainable. 27 P. L. R. 1915 : 27 I. C. 1018. Defendant promised to give his minor girl in marriage to the plaintiff in consideration of a sum of money. The defendant failed to fulfil his part of the contract. Held, that the plaintiff can bring a suit for the recovery of money paid. 10 C. 1054. An agreement to remunerate or reward a third person in consideration of negotiating a marriage is contrary to public policy. 17 M. 9, 1926 P. 582 : 5 P. 646, 13 B. 126 (131).

### Illustrations

(i) This was a case of breach of promise of marriage with a claim for heavy damages by a young and attractive lady against a much elderly man, who was a rather rough, shabby and unshaven man, who was running a big and profitable business. The defendant conducted his own case. His plea was that the marriage fell through on account of the coldness of the lady rather than any fault of his own. The following is the kind of cross-examination adopted by the defendant :—

He asked if she had a letter in which he complained of her conduct. "Yes, she had."

Of course the learned counsel for the plaintiff was on his legs in a moment with his objection :—"No notice to produce to produce my Lord." Beautiful pettifoggism this was, which told well with the Jury, who concluded that the counsel did not dare to produce it. What else could they think? No notice! They, the Jury, wanted to see it.

"No notice to produce," the counsel repeats triumphantly with a defiant shake of the head.

The Jury shook theirs too ; and well they might, if this was advocacy. "You have given no notice to produce," says the Judge.

"I am not acquainted, my Lord, with the forms of law. She has got it there, I daresay, without any notice. If I had the means of employing a lawyer, my Lord, I should not have been in my predicament ; but I was not up to this sort of thing. Then the Jury must not see it, I suppose ?"

"You will not suffer through not having a counsel," says my Lord, "I assure you." Which was quite true.

"I could not afford it, your Lordship, that is why a solicitor would not take up my case. I am only a poor man."

"We will see about that," says the astute counsel. "We will see about that presently."

"What is the date of that letter ?" asks the Judge.

"It was in March, my Lord, while she was away in Cumberland I wrote to ask when—."

"I object," emphatically cries the astute pleader. "I object."

"I wrote to ask when she was coming back," says the defendant, "as I got five children, my Lord, and nobody to look after them."

"Which do you object to ?" inquires the Judge, "to his asking her to come back or the five children ?"

"Oh, my Lord," deprecatingly answers the counsel, "this is too bad. I object to all of it ; he has given evidence of the contents of a letter which there was no notice to produce. Really, my Lord !"

"How old are your children ?" asks the Judge, "it does not require any notice to produce them, I suppose."

"The oldest is fifteen, my Lord, and the youngest two years and eight months."

"Do you object to that Mr.—?"

"Oh, no my Lord ; it is no use to my objecting ; it is in now."

"Is there anything in that letter," asks a Juror, "that the counsel is afraid of, as he don't want it read ? Because if it has anything to do with the case we should like to see it."

"Oh Dear, no Sir," answers the learned Queen's counsel with quite a ready wit, "only there was no notice, Sir. But, of course, I should wish it to be read—I want it read. Indeed I should have put it in myself if you had not asked for it." This surely is not a good style of advocacy.

Part of the letter had really been quoted in the opening speech. And now comes the other part, amounting to this. The defendant could not afford a house-keeper, there was no one to look after his motherless children, and his business was going to rack and ruin ;—at all of which there was much laughter, not at the misery but at the skill of defendant.

"My Lord," says he, "here is her answer to that letter."

Up jumps the plaintiff's counsel once more with his lamentation :

"Oh, my Lord, (another objection) : he ought to have had inspection-letter kept back"—and so on, making the administration of justice look more like a burlesque than a business proceeding.

But the letter was at last read. True, there was neither warmth nor feeling in it, hardly civility. It was rather the letter of a common scold than a lover. No wonder the learned gentleman tried to conceal it behind technicalities. When the defendant has thus evoked the sympathy of the Judge and the Jury in his favour, the following cross-examination of the defendant by the plaintiff's counsel is not at all suited:—Now, then, said he jumping from his seat to cross-examine:—

Q. "You live in a house, do you not, of a hundred and twenty pounds a year, do you not? Now be careful, Sir, we know something about you."

A. "That is what keeps me poor, that and my family leaves me without a penny. They put on twenty pounds last year to it."

Q. "What is your business worth, Sir? Be careful, now." A. "I am careful," says the man, "as careful as ever I can be."

Q. "What is your business worth, is my question," repeats the counsel. "What would you take for it?"

A. "Well," says the defendant, "if you like to clear up what I owe, you can walk in and I will walk out; and you will find you won't get much of a living then. But perhaps you might not have a family, Sir?"

Q. "What about good-will?" asks the counsel. A. "Good-will—well, Sir,—all at."

Q. "But you have other property, have you not, Sir?" A. "I have and here it is," said the man, producing some pawn tickets.

Q. "Do you mean to swear, Sir, that you have no other property? Come, now, be careful, Sir,—we have got witnesses. A. "I do, Sir."

Q. "No money?" A. "I might have a few shillings—she thought I had a good deal no doubt."

Q. "Why do you say she thought you had money? A. "Because they were always wanting it."

Q. "Whom do you mean by they?" A. "She and her mother and father."

Q. "Do you mean to swear, Sir, you have no money in the bank? A. "Not as I know of."

Q. "She has told us you have." A. "Well, if you like to believe all she will swear to, you will have enough to do."

Q. "I will have an answer, Sir; have not you money in the bank?" A. "Well, Sir," said the man, "here is my bank-book—that knows more about it than I do; if I have got any there I will soon have it out."

Q. "Let me see it," said the counsel.

After examining the book he handed it back without a word.

The Judge wanted to look at it.

"Why," said his Lordship, "the balance is the wrong way."

Then the Jury looked at it and passed it back with a toss of the head.

Another question:—"Did you not break off this engagement because you wished to marry a widow with £900?"

"I wish I could find one, Sir; I would take one with a deal less than that." (*Laughter.*) Case dismissed with costs. Harris pp. 12—16.

(ii) In a breach of promise case the defendant, Scarlett's client had alleged to have been cajoled into an engagement by the plaintiff's mother. She was



a witness on behalf of her daughter, and completely baffled Scarlett, who cross-examined her. But in his argument he exhibited his tact by this happy stroke of advocacy. "You saw, gentlemen of the Jury, that I was but a child in her hands. What must my client have been?" 16 M. L. J. 174.

(iii) This was an action for damages for breach of marriage by Miss Eugenie Martinez, a beautiful Spanish woman of just 21 years of age, against one Juan Del Valle, the defendant, a rich middle-aged Cuban banker; the suit was for £50,000 damages for seduction and breach of promise of marriage; the intensity of the public interest on this particular occasion can readily be imagined. Mr. Beach was for the plaintiff and Mr. Choate was for the defendant.

The plaintiff and defendant were strangers until the day when she had slipped on the ice, and had fallen in front of the Gilsey House on the corner of 29th Street and Broadway. Mr. Del Valle had rushed to her assistance, had lifted her to her feet, conducted her to her home, received the permission of her mother to become her friend, and six months later had become the defendant in this notorious suit which he had tried to avoid by offering the plaintiff £20,000 not to bring the matter into Court.

Mrs. Martinez took the witness-stand in her own behalf and thus told her story:—"I became acquainted with Juan Del Valle under the following circumstances: On or about the fourteenth of January, 1875, when passing through 29th Street, near Broadway, I slipped on a piece of ice and fell on the sidewalk, badly spraining my ankle. Recovering from my bewilderment, I found myself being raised by a gentleman, who called a carriage and took me home. He assisted me into the house, and asked whether he might call again and see how I was getting on. I asked my mother, and she gave him permission. He called on me the next day, and passed half or three quarters of an hour with me, and told me he was a gentleman of character and position, a widower, and lived at 55, West 28th Street, that he was very much pleased with and impressed by me, and that he desired to become better acquainted. He then asked whether he might call in the evening and take me to the theatre. I told him that my step-father was very particular with me, and would not permit gentlemen to take me out in the evening, but that, as mother had given her consent, I had no objection to his calling in the afternoon. He called three or four times a week, sometimes with his two younger children, and sometimes taking me to drive in the Park. About three weeks after the beginning of our acquaintance he told me he had become very fond of me, and would like to marry me; that his wife had been dead for three years, and that he was alone in the world with four children who had no mother to care for them, and that if I could sacrifice my young life for an old man like him, he would marry me and give me a pleasant home; that he was a gentleman of wealth, able to provide for my every want, and that if I would accept him I should no longer be compelled, either to endure the strict discipline of my step-father, or to struggle for simple existence by teaching. He gave me the name of several residents of New York, some of whom my step-father knew personally, of whom I might make inquiries as to his character and position. I asked Mr. Del Valle whether he was in earnest saying that I was comparatively poor, and since my step-father's embarrassment in business had not mingled in society, and wondered that he should select me when there were so many other ladies who would seem more eligible to a gentleman of his wealth and position. He replied that he was in earnest and he had once married for wealth, but should not do so again. He told me to talk with mother and give him an answer as soon as possible. He said that he loved me from the first moment he saw me, and could not do without me.

My mother gave consent and I promised to marry him. Mr. Del Valle then took me to Delmonico's, and after we had dined, we went to a jewellery store in 6th Avenue, and he selected an amethyst ring for an engagement ring, as he said. The ring was too large and was left to be made smaller. Two or three days afterwards he called on me at my house, placed the ring on my finger, and said, "Keep that ring on that finger until I replace it with another." "At the third interview after the presentation of the ring, Mr. Del Valle said that owing to some difficulties in his domestic affairs, which he called a "compromise," he did not think it best to be married publicly, as he feared that the publication of his marriage might cause trouble. So he urged me to marry him immediately and privately. I was greatly surprised, and said: "If there is any trouble, why marry at all? I hope there is nothing wrong. What is the nature of the 'compromise?'" and he replied: "Oh, there is nothing wrong, but I have a 'compromise' in Cuba, and it is not convenient for you or me to marry publicly, as the person concerned might make you trouble!" I told Mr. Del Valle that I would not marry him privately, and that I would release him from his engagement. A day or two afterwards he took me to a restaurant to dine with him, and I then gave him a letter in which I enclosed the engagement ring, and told him I would not marry him privately. This letter I sealed, asking him not to open it until after we had separated. Five or six days afterwards he called again, and seemed ill. He said that my letter had made him sick, and he asked, "What could induce you to write such a letter, Eugene? You could not have loved me if you thought so much about the nonsense told you about a compromise. The compromise is all arranged, and I want you to take back the ring, and say when and where we shall be married." I said I still loved him, and if the compromise had been arranged, I would accept the ring, but would not marry him secretly. He then put the ring on my finger, and said, "Now I want you to tell when and where we shall get married." It was finally agreed that we should be married in the fall. "From the date of this conversation, which was early in March 1875, until the twenty-eighth of April, 1875, Mr. Del Valle called almost daily and took me to the theatres and other places, and was received at home by all my family except my step-father, as my accepted suitor. He frequently complained that he could not call in the evening, and wished me to live in his house in Twenty-eighth Street, and take charge of his children. I refused, and he then proposed to take a place in the country, where the children could have plenty of air and exercise, if I would go and take charge of them, and as we were to be married so soon, he wished me to get well acquainted with his children, adding that if I really loved him, I need have no doubt about his honourable intentions. I laughed at the idea, but finally consented to leave my home and go into the country with his family. As I was losing all my pupils, he insisted upon giving me £100 a month. He persuaded me there was no impropriety in his suggestion, as we were to be married, and that I should never return home excepting as his wife. I had told him that my step-father had threatened to shoot me and any man whom I might marry. He persuaded me to leave my home at once, and as he had not yet secured a country house for the summer, I was to go to the Hotel Royal for a few days and live under an assumed name, which I did. He kept me at the hotel for five weeks, persuading me not to return home, and by the first of June he had secured a country place at Poughkeepsie, and I went there to live with himself and his four children. His conduct towards me up to this time had always been everything that could be desired,—always kind and considerate and anxious for my every comfort,—neither by word nor act did he indicate to me that his intention was any other than to make me his wife. He had engaged a very

fine mansion at Poughkeepsie, overlooking the Hudson, fine grounds, and everything one could desire in a country house. Mr. Del Valle gave me the keys of the house and told the entire establishment was under my charge. Six days after I arrived at Poughkeepsie he forced his way into my bedroom. I insisted upon an immediate marriage as my right. He told me he had not been able to arrange the compromise in Cuba, and begged me to be reasonable and he would be my life friend; that I could not return home under the circumstances, and that anything I might at any time want he would always do for me. He tried to persuade me that I would best accept the situation as it was, and that it was a very common occurrence. I had no home to go to and did not dare to record the circumstance to my mother; I would have died first. Three months later, or at the end of the summer, his manner entirely changed towards me. I repeatedly asked him for some explanation. He persuaded me that his coldness was assumed to prevent the servants from talking, that he was going to Cuba to try to fix up the compromise, and prevailed upon me to go back to my home and parents and wait. This I did on the sixth of September. After I returned to New York, I wrote to him but received no reply, and had never seen him since."

After this evidence had been given in the examination-in-chief, the cross-examination of the lady commenced. In starting his cross-examination, Mr. Choate proceeded to introduce the plaintiff to the jury by interrogating her with a series of short, simple questions, the answers to which elicited from the lady a detailed account of her life in New York since the year of her birth. She said she was twenty-one years old; was born in New York City; her parents were French; her own father was a wine merchant; he died when she was seven years old; two years later her mother married a Mr. Henriques, with whom she had lived as her step-mother for the fourteen years preceding the trial. She had been educated in a boarding-school, and since graduation had been employing herself as a teacher of languages, etc., etc.

Mr. Choate had in his possession a letter written by the plaintiff to Mr. Del Valle during the first few weeks of their acquaintance. In this letter, Miss Martinez had complained of the wretchedness of her home life in consequence of the amorous advances made to her by her step-father. Mr. Choate was evidently of the opinion that this letter was a hoax and had been written by Miss Martinez for the sole purpose of eliciting Mr. Del Valle's sympathy, and inducing him to allow her to come and live in his family as the governess of his children with the idea that a proposal of marriage would naturally result from such propinquity. The letter was in the following terms:—

"Dear friend: I believe I promised to write and tell you my secret. I will now do so. When I was nine years of age my father died. My mother married my uncle, who is now my father. To make a long story short, papa loves me, and has done everything in his power to rob me of what is dearer to me than my life,—my honour. And ever since I was a little child he has annoyed me with infamous propositions and does so still. You can easily imagine how unhappy and miserable he made me, for I don't love him the way he wishes me to, and I cannot give him what he wants, for I would sooner part with my life. I have only God to thank for my unsullied honour. He has watched over me in all my troubles, for oh, my dear friend, I have had so many, many trials! But it is God's will and I always tried to be a good girl, and now you know my secret, my heart feels light. I now leave you, wishing you all my sincere good wishes, and with many kisses to the dear little girls, I remain your friend,

Eugenie.

"N. B.—I will meet you on Saturday at 1 o'clock, corner of Twenty-eighth Street and Broadway."

Suspecting that the contents of this letter were false, and judging from statements made in the plaintiff's testimony-in-chief that she had either forgotten all about this letter or concluded that it had been destroyed, Mr. Choate set the first trap for the plaintiff in the following simple and extremely clever manner:

Q. "By what name did you pass after you returned home from boarding school and found your mother married to Mr. Henriques?" A. "Eugenie Henriques, invariably."

Q. "And when did you first resume the name of Martinez?" A. "When I left the roof of Mr. Henriques."

Q. "Always until that time were you called by his name?" A. "Always."

Q. "Did your father exercise any very rigid discipline over yourself and your sister that you remember?" A. "He did."

Q. "When did that rigid discipline begin?" A. "It commenced when I first knew him."

Q. "And it was very rigid, wasn't it?" A. "It was very."

Q. "Both over yourself and over your younger sister?" A. "Yes."

Q. "Taking very strict observation and care as to your morals and your manners?" A. "Exceedingly so."

Q. "How did this manifest itself?" A. "Well, in preventing my having any other associates. He thought there was no one good enough to associate with us."

Q. "Then he was always very strict in keeping you in the path of duty, was he not?" A. "Most undeniably so."

Q. "Was this a united family of which you were a member? Were they united in feeling?"

A. "Very much so indeed. There are very few families that are more united than we were."

Q. "All fond of each other?" A. "Always."

Q. "As to your step-father, you were all fond of him and he of you?"

A. "Very fond of him indeed, and he very fond of us."

Q. "And except this matter of his rigid discipline, was he kind to you?"

A. "Very."

Q. "And gentle?" A. "Very gentle and very kind."

Q. "Considerate?" A. "Very considerate always to our happiness, but he did not wish us to associate with the people by whom we were surrounded, as we were not in circumstance to live amongst our class."

Q. "When was it that he first introduced the subject of marriage, of forbidding you to marry, or thinking of marrying?" A. "Well, when I was about sixteen or seventeen."

Q. "And was it then that he said that if you married, he would shoot you and shoot any man that you married?" A. "He did."

Q. "That was the one exception to his ordinary gentleness and kindness, wasn't it?" A. "Yes."

Q. "And the only one?" A. "And the only one."

Q. "Your step-father is no longer living, is he?" A. "He is not. He died last October."

Leaving the subject at this stage, Mr. Choate went on to the next point in his cross-examination, which had nothing to do with the subject he was previously cross-examining upon.

Q. "Can you fix the date in January when you first saw the defendant, Mr. Del Valle?"

A. "It was on the fifteenth day of January,—either the fourteenth or the fifteenth. It was on a Thursday. I had an appointment with my dentist."

Q. "Thursday appears by the calendar of that year to have been on the fourteenth of January." A. "That was the day."

Q. "What time in the day was it that you first met Mr. Del Valle on the Thursday, the fourteenth day of January?" A. "About half-past two o'clock in the afternoon."

Q. "Have you any means of fixing the hour of that day?" A. "Yes, I had an appointment with my dentist at three o'clock."

Q. "Your appointment with the dentist had been previously made and you were on your way there?" A. "I was on my way there."

Q. "It was at the corner of Broadway and 29th Street that you fell on the ice, was it not?" A. "It was."

Q. "You did not observe the defendant before you fell?" A. "I did not."

Q. "And you had never seen him before?" A. "I had never seen him before."

Q. "Did this fall render you insensible?" A. "Very nearly so. I fell on my side and was lying down on the ground when Mr. Del Valle raised me up. I remember there were some iron railings near there, and I was leaning against these railings while Mr. Del Valle hailed a cab, assisted me into it, and took me home. He told me in the cab that he had been following me all the way up Broadway."

Q. "Did he tell you for what object he followed you?" A. "He did not. He merely told me that he was following me."

Q. "And you did not ask him for what purpose he followed you?" A. "I did not."

Q. "Did he drive you to your home?" A. "He did, and when we arrived he assisted me into the house. I had sprained my ankle. He explained my accident to my mother and that he had brought me home. My mother thanked him and he asked if he might call again and see how I was getting along with my injury."

Q. "You were somewhat seriously disabled by your accident, were you not?" A. "I was."

Q. "For how long?" A. "Well, for two or three days."

Q. "A sprained ankle?" A. "My ankle hurt me very much. I had it bandaged with cold water and lay on the bed for two days. The third day I was able to limp around the room only a little, and the fourth day I could walk around."

Q. "How long was it before you got entirely over it, so to be able to go out of doors?" A. "Well, I went out the fifth day."

Q. "And not before?" A. "And not before."

Q. "So that because of the injuries that you sustained, you were confined to the house for five days?" A. "I was."

Q. "And the first day, or January 16, you were confined to your room and lying upon the bed?" A. "Yes, Sir, I reclined upon my bed. I was not confined in bed as sick."

Q. "When was the first time that you were with Mr. Del Valle at any place except at your father's or your mother's house?" A. "Do you mean the first time that I went out with him?"

Q. "Yes." A. "It was during the week following that in which I met him. I met him on Thursday, the fourteenth, and went out with him sometime during the following week."

Q. "What was the place?" A. "We went to Delmonico's to dine." (N. B.:—This would take the date of the purchase still further than a week from the date of the accident.)

Q. "Was the ring the only present he gave you, or the first present?" A. "Oh, no, not by any means."

Q. "When did you begin to accept presents from him?" A. "The first day I went out with him, when we went to Delmonico's, I accepted books from him."

Q. "What was the book that he then presented to you." A. "Oh, well, I forgot the title of it. I think it was 'Les Miserables' by Victor Hugo."

Q. "And from that time he continued, when you went out with him, as a general thing, giving you something?" A. "Giving me books and buying me candies. After we were through dining, he would stop at a confectioner's and buy me something."

Q. "Down to the first time of the talk of marriage, which you say was about three weeks after you met, how many times did you go with him to Delmonico's or other restaurants?" A. "Well, on an average of about two or three times a week."

Q. "Where else did you go besides Delmonico's?" A. "The first time I went to any place with him besides Delmonico's was at the time of the engagement, when he gave me the ring when he brought the ring for me."

Q. "Where did you go then?" A. "We went in University Place somewhere. I do not exactly know what street."

Q. "What side of University Place was it?" A. "On the opposite side from Christian's book store."

Q. (With a smile). "Was it a place called Solari's?" A. "I think it was."

Q. "How many times did you go there with him before he gave you the ring?" A. "I never went there before he gave me the ring. That was the first time I ever went to this place."

Q. "How came you there in University Place if you live up in 56th Street? Did you make an appointment to be there?" A. "He came up to the house for me."

Q. "Came up and took you down there?" A. "Yes. Didn't he come up to inquire if I had accepted him as a husband, and ask me if I had consulted with my mother, and ask me what answer I had for him, and had I not told him that I would marry him? It was then that he took me to this restaurant in a carriage, and after that he bought the ring for me."

Q. "The same day?" A. "The very same day."

Q. "Some considerable number of weeks, you say, intervened between your first acquaintance and this dinner at Solari's—this engagement and the giving of the ring?" A. "About three weeks as nearly as I can fix the time."

Q. "Where was the jewellery store where the ring was bought?" A. "It was on Sixth Avenue. I cannot say near what street it was. I felt cold and tired that day. We walked from Solari's and it seemed to me as though the walk was rather long."

Q. "You remember the name of the store?" A. "I do not."

Q. "Should you know the name if I told you?" A. "No, I never knew the name."

Q. "Did you ever go to this store but this one time?" A. "Never went there but one time."

Q. "And you are sure of that?" A. "I am very sure of that."

Q. "The only time you were there was with Mr. Del Valle?" A. "That was the only time I have ever been in that store in my life."

Q. "You say you looked at a solitaire diamond ring?" A. "Yes, but Mr. Del Valle told me that he preferred an amethyst, and I took the amethyst."

Q. "There was a considerable difference in the cost, wasn't there between them?" A. "There was."

Q. "Do you know the cost of the amethyst ring?" A. "I think it was forty-five dollars."

Q. "The cost of solitaire diamond ring might be many hundreds of dollars?"

"One hundred and five dollars, one hundred and ten dollars, on hundred and fifteen dollars,—I do not know."

Q. "Did you look at any other jewellery?" A. "Mr. Del Valle asked me if I wished anything else, but I did not."

Here Mr. Choate showed the witness the letter addressed to Mr. Del Valle which she had left at the jeweller's on her second visit there, the handwriting of which the witness denied.

Then the cross-examination took a somewhat different turn. By this time Mr. Choate had laid a sufficiently strong foundation to show the real character of the witness to the Judge and the jury. Yet the questions were put in mild and gentle tone.

Q. "Now let me refresh your recollection a little, Miss Martinez. Didn't this visit to the jeweller's take place on the fifteenth of January, the day after you made the acquaintance of Mr. Del Valle?" A. "Oh, no, not by any means, Sir."

Q. "Sure of that?" A. "I am very sure of it, for I was confined to my room the day after I first made the acquaintance of Mr. Del Valle."

Q. "Then you never went to that jeweller's store but once?" A. "Never. I would not know the store, and do not know. I do not recollect the name or anything about it."

Q. "There was some trouble about the ring being too large, wasn't there?" A. "Yes, the ring was too large for the finger I wished it for."

Q. "And orders were left to have it made smaller?" A. "Yes."

Q. "What arrangement was made, if any, for your getting the ring when it should be made smaller?"

A. "There was no arrangement made. Mr. Del Valle merely said that when he called upon me again he would bring it to me and he did bring it to me."

Q. "About what time was that; in February?" A. "It was, I should say, the first week in February. I cannot give the exact date."

Q. "Now let me again try to refresh your recollection. Didn't you yourself go to the jewellery store and get the ring?" A. "I myself?"

Q. "You yourself." A. "I never went to that jewellery store but once in my life, and that was with Mr. Del Valle himself while I selected the ring."

After a few unimportant questions on this subject, the cross-examination turned on another topic.

Q. "Did you ever go by any other name than your own father's name, Martinez, or your step-father's name, Henriques?" A. "I did not."

Q. "Did you ever have letters left for you directed to Miss Howard care of J. Krank, No. 1060, First Avenue?" A. "I never did."

Q. "Do you know No. 1060, First Avenue?" A. "I do not. I have no idea where it is."

Q. "Do you know what numbers on First Avenue are near to your house on 56th Street?" A. "I do not. I never went on First Avenue."

Q. "Did you ever have any letter sent to you addressed to Miss Howard, care of Mrs. C. Nelson, on Ninth Avenue?" A. "I never did."

The purpose of these questions was as follows:—

On behalf of the defendant Mr. Choate was intending to swear as witnesses a Mr. Louis, who kept the store on Ninth Avenue around the corner from where the plaintiff lived in 44th Street and a Mrs. Krank, who lived around the corner from her residence on 56th Street, who would both testify that the plaintiff had a confirmed habit of having letters left there,—letters from various gentlemen, some of them having the monogram "F. H.," the initials of Frederick Hammond, the clerk of the Hotel Royal.

Mr. Choate also had in his possession a letter of the twenty-second of January, in the plaintiff's handwriting and addressed to Mr. Del Valle at the inception of their acquaintance, which read, "Should you deem it necessary to write to me, a line addressed 'Miss Howard, in care of J. Krank, 1060, First Avenue,' will reach me."

Next Mr. Choate went back to the subject of the presentation of what the plaintiff called the engagement ring.

Q. "At the meeting when Mr. Del Valle brought the ring to your house, was anybody present?" A. "Nobody was present."

Q. "And I have forgotten how long you said it was that you kept the ring before returning it to him." A. "I never told you any stated time."

Q. "Well, I would like to know." A. "I returned the ring to him when I dissolved the engagement between him and me—about a week or so after I had received the ring."

Q. "Then it was only a week that the engagement lasted at first before it was resumed the second time?" A. "Well I think so."

It may be noticed at this stage, that the plaintiff had already read in evidence to the jury a fabricated copy of a letter breaking her engagement to the defendant returning him the ring. There had been no such letter in fact handed to Mr. Del Valle, but the plaintiff had substituted this alleged copy for a letter, the original of which Mr. Choate had in his possession, which was the one



already referred to, wherein the plaintiff had complained of the brutal solicitations of her step-father, and had requested him not to read until he was alone.

Q. "Now you have spoken of the circumstances under which you returned him the ring in a letter, with injunctions not to open the letter until you separated. What was your purpose in requiring him not to open the letter until he should be out of your presence?"

A. "Because I knew if I told him what my purpose was, he would not accept it. He would not dissolve the engagement between us, and I wished him to see that I was determined upon it. That was my purpose."

Q. "Was not the fact of the ring being in the letter quite obvious from the outside?" A. "It was, and he asked me what it was."

Q. "Where was it that you handed him that letter?" A. "When we were dining."

Q. "At what place? Was it this place you have just mentioned—Solari's?" A. "Yes, Sir."

Q. "How many times had you been there then?" A. "We went there after our engagement very frequently."

Q. "Was that your regular place of meeting after your engagement?" A. "Sometimes we went to Delmonico's; more frequently we went to Solari's."

Q. "And it was there that you handed him the the letter? How long before going there had you written the letter?" A. "It was written the day after he spoke to me of having a compromise in Cuba. The very day after, I made up my mind to break the engagement."

Q. "Tell me, if you please, all that he said when he spoke about this compromise."

A. "Well, we were coming home in a carriage, and he asked me when we should be married, and I told him I did not know; that I was not thinking of it yet for some time, and he said that when we should be married, he would like to be married privately, without anybody knowing about it. That he had a good many friends here in New York and people that were apt to talk, and he requested me to marry him privately and at once."

Q. "Did he say that he already had a wife as a 'compromise'?" A. "He did not."

Q. "Did he explain in any way what this 'compromise,' as you call it was?" A. "He merely told me, 'Oh there is no secrecy. I have a compromise in Cuba—some trouble there, for reasons best known to myself, but that it was better to marry privately.'"

Q. "Did you believe he had another wife living in Cuba?" A. "No."

Q. "What was there that you supposed could prevent a man marrying again if he loved a woman, as he said he did you, except the existence of a wife already?" A. "Well, I thought perhaps he had some alliance with some woman whom he had promised to marry, or was obliged to marry, and could not marry any other woman under those circumstances."

Q. "He did not suggest anything of that sort?" A. "That was only the impression that I received at the time,—what I thought."

Q. "And you never had any other impression but that, had you?" A. "No, I had not."

Q. "When you concluded to take him again it was under that impression?" A. "Not at all. He told me that the compromise was arranged and had been adjusted. I took him again and became engaged to him."

Q. "Your idea of the nature of the compromise when you took him again was that he had been engaged to another woman in Cuba and promised to marry her. Is that it?" A. "Yes, Sir, it was something of that kind."

Q. "Then, when you concluded to take back the ring, it was upon the understanding that he had broken an engagement with a woman in Cuba. Did it not occur to you as an obstacle, when you took him again, that he had just broken a match with another woman?" A. "No, not at all."

Q. "You did not care for that?" A. "No, I did not care for it, because I trusted him."

Q. "How often did Mr. Del Valle visit you at this time?" A. "Four or five times a week."

Q. "Did you and your mother keep these visits of this gentleman and the engagement a secret from your step-father?" A. "We did."

Q. "And that because of his threat to shoot you and the man if you ever married?" A. "Yes, Sir."

Q. "Had your father kept weapons ready?" A. "Well, no I do not think he did."

Q. "Did you ever make any complaint to Mr. Del Valle of being harshly treated by your step-father?" A. "I never did. My father never treated me harshly."

Q. "I want you to look at this signature and see whether that is yours on the paper now handed you." (Passing a paper to witness). A. "I could not say whether it is mine or not."

Q. "What is your opinion?" A. "I do not think it is. It does not look my signature."

Here Mr. Choate goes back to the subject of her fabricated letter.

Q. "How is it that you have produced here a copy of the letter in which you say you enclosed the ring in February or March? How is that?" A. "I do not know. I merely found a copy one day in a book. I never made a practice of copying."

Q. "When and where did you make the copy of that letter?" A. "I did not make any copy of it after I had sent the letter to Mr. Del Valle, but the paper upon which I wrote was defective when I wrote it to him. There was a blot or something on it, and I found the copy afterwards."

Q. "Then you do know exactly how you came to have a copy?" A. "Yes, it was in my desk drawer, that is all, but I did not make a practice of keeping copies of all the papers."

Q. "Did you not say a moment ago that you did not know how you came to have a copy?" A. "No; I did not know how I came to have a copy."

Q. "In what respect did this copy differ from the original enclosing the ring?" A. "It did not differ. I only said there was a blot upon the paper and I put it into a drawer and wrote another one, and that paper remained blotted in the drawer for a considerable length of time."

Q. "What part of the paper was the blot on?" A. "The first page."

Q. (Handing the letter to the witness). "Whereabouts do you see the blot?" A. "Oh, well, it is not on the copy at all."

## CROSS-EXAMINATION

Q. "Oh, you sent the blotted one?" A. "No, I did not. I kept the blotted one in the drawer. I did not send that."

Q. "Where is the blotted one?"

[Referring to this question, Mr. Wellman says:—"Mr. Choate put one question too many by asking—Where is the blotted one? The affect of his previous questions concerning this fabricated copy of a letter was entirely lost by allowing her a chance to reply, "I have the blotted copy at home. I have a copy of all these letters at home." The reply was false, but had she been called upon to produce the blotted copy she could have easily supplied it overnight. Mr. Choate had made his point, a good one, but he didn't leave it alone and so spoiled it."]

A. "I have it at home. I have a copy of all these letters at home."

Q. "Then you made a second copy from that blotted copy?" A. "I did."

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Q. "Now you say, Miss Martinez, that you went to the hotel on the twenty-eighth day of April?" A. "I did."

Q. "From where did you go?" A. "From my own home."

Q. "Did you know anybody at that hotel?" A. "I did not."

Q. "Did you know any of the managers or clerks at the Hotel Royal?" A. "I did not."

Q. "Did you register your name at that hotel?" A. "I just merely gave my name as 'Miss Livingston.' I did not register. I suppose I was registered." (The name "Miss Livingston" registered on the hotel register was in the handwriting of this same Frederick Hammond).

Q. "To whom did you give your name as 'Miss Livingston'?" A. "To a gentleman whom I saw before taking board there. I went to arrange for a room the day before, and he asked me my name and showed me a room and I told him my name was 'Miss Livingston,' and he put it down."

Q. "Who was that gentleman?" A. "I do not know who he was, or what he was."

Q. "Do you know a gentleman named Frederick Hammond?" A. "My receipts were signed that way, by the name of Hammond. Mr. Del Valle told me that he was acquainted with some of the managers of the hotel, and it was that hotel that he suggested my going to."

Q. "You went by his suggestion?" A. "I went by his suggestion to this hotel."

Q. "Did he tell you of Frederick Hammond?" A. "He did not. He merely said that he knew some of the managers."

Q. "You say that Hammond was the name signed to your receipt?" A. "Yes, Sir."

Q. "Was that the name of the gentleman to whom you gave your name as 'Miss Livingston'?" A. "I really do not know."

Q. "Was it anybody you had ever seen before?" A. "I had never seen the person before in my life."

Q. "And you do not know how or by whom your name was registered in that hotel-book?" A. "I do not know. The gentleman merely asked me my name and I told him. I told him the room would suit me, and I would come the next day."

Q. "Then you went alone both days?" A. "I did."

Q. "And both times without the defendant?" A. "Without the defendant."

Q. "You selected a room that suited you?" A. "I did. On the top floor. It was the only room that was available."

[It was shown later that this room was a small-sized hall bed-room, and yet Miss Martinez was supposed to have made this arrangement with this hotel at the request of her wealthy affianced husband.

In speaking of this in his summing up. Mr. Choate said:—"That does not look like Mr. Del Valle's generous accommodations. Mr. Del Valle was profuse, lavish. She had the richest meals, the finest terrapin, wines of her own choice, always, at Solari's. But here in a four-by-ten room, in the fourth storey of the Hotel Royal.—Why, gentlemen, that looks to me a little more like Frederick Hammond, who wrote her name in the hotel register!"]

Q. "Did the defendant select this name of Livingston for you?" A. "He merely told me to take an assumed name,—to go under some other name,—and I chose the name of Livingston."

Q. "Did you object to it when he told you to go there under an assumed name?" A. "No, I did not."

Q. "You were entirely willing to go to a strange hotel alone under an assumed name?" "Yes. For a short while."

Q. "I wish you would tell us again precisely what it was that induced you to go to this strange hotel under such circumstances."

A. "Well, Mr. Del Valle suggested that perhaps it would be better for me. He did not wish to have any trouble with my step-father concerning my disappearance, neither did I wish to give him any unnecessary trouble, if my father should take any violent steps of any kind, as he had so often threatened to do, and he suggested that I should take a room somewhere at some hotel, and see how papa would act."

Q. "How was papa to know anything about it if you were under an assumed name?" A. "Well, he certainly would know something about it when I left home."

Q. "And the plan was that he should know about it?" A. "Should know what?"

Q. "Should know that you had gone?" A. "Why, of course."

Q. "To this hotel?" A. "No, not to the hotel. He knew that I had left home, and my fear was that he would hire detectives to search for me, and of course, if he discovered me in Mr. Del Valle's home, I could not answer for the consequences."

Q. "What consequences did you apprehend?" A. "I apprehended that he would kill Mr. Del Valle and kill me."

Q. "And rather than that, you were willing to go to this hotel in this manner?"

A. "Certainly, Mr. Del Valle suggested it."

Q. "Do you know whether your father did do anything because of your leaving?" A. "Yes, I know that he put a personal in 'the Herald' for me."

Q. "Did you show this personal to Mr. Del Valle?" A. "I showed it to him."

Q. "Did you discover it in 'the Herald'?" A. "I did."

Q. "The 'personal' in 'the Herald' of the second day of May, or about five days after you had reached the hotel, is contained in this paper which I now show you, isn't it?" A. "Yes."

Q. "Now after the second of May, therefore you knew that the 'personal' had come from your father, didn't you?" A. "I did."

Q. "After you knew that your father 'was inconsolable and would make a satisfactory,' you did not have any more fear of his shooting you or Mr. Del Valle either, did you?"

A. "I most certainly did. My father was not to be relied upon in what he said at all. He said a great many things which he never meant."

Q. "Do you mean that he did not have a good reputation for veracity?"

A. "Not at all. But I knew that he had always threatened to shoot me and my husband, if I ever had one, and I knew that he would not make 'all satisfactory,' and that is why I did not return home."

Q. "Did you answer this 'personal'?" A. "I did not."

Q. "Did you take any notice of your unhappy father?" A. "I did not."

Q. "Made no effort to console him?"

A. "I did not. I loved Mr. Del Valle, and went with Mr. Del Valle and trusted him. I had nothing to do with my father. My father had many others to console him."

Q. "While you were at the Hotel Royal did you make a visit to Central Park with Mr. Del Valle?" A. "Yes, frequently we went up to the Park and walk all round. It was the only chance I had of going out—when he took me up there."

Q. "Do you remember anything you told him at that time?" A. "Nothing in particular."

Q. "Did you tell him that your step-father had been using you brutally?"

A. "I did not. I never told him any such thing."

Q. "Did you say that you had to leave home and go to the hotel because of the bad treatment of your step-father?" A. "I never did tell him so."

Q. "Did you ever tell anybody that?" A. "I could never tell any one so, because my step-father never treated me badly."

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Q. "When was it that the arrangements were completed and the family moved to the summer home in Poughkeepsie?" A. "The 1st of June."

Q. Did you go direct to Poughkeepsie with Mr. Del Valle and his children?" A. "I did."

For the rest cross examination *see* Chap. 36 *Supra*,

## CHAPTER 69

### In Suit for Damages for Breach of Contract

Breach of contract always gives rise to damages, and the onus is always on the defendant to show that he is not liable, when a contract and its breach are established. The law relating to this subject is summarized below.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course

of things from such breach or which the parties knew, when they made the contract to be likely to result from the breach of it. Such compensation is not to be given for any remote or any indirect loss or damage sustained by reason of the breach. *See* S. 73, Contract Act.

Damages are awarded for the injury which a party sustained as the result of the default by the other party. The party who is entitled to compensation must have done something to his own prejudice in the performance of his part of the contract. 1934 No. 129 : 151 I. C. 63. Unless damage has actually been suffered there is no cause of action for breach of contract. 1933 A. 511, 48 I. C. 810. A vendor who has no goods to deliver cannot claim damages for breach of contract, not to take delivery by purchaser. 1934 N. 129.

To claim damages for breach of contract plaintiff left must prove that he has performed or was ready and willing to perform his part of the contract. 1936 P. C. 286 : 163 I. C. 417.

The amount of damages must be established with reasonable certainty. 1923 C. 49 : 72 I. C. 27.

Where vendee agreed to pay a portion of purchase money to the vendors' creditors, a suit to recover the unpaid purchase money lies without proof of any damage, 1930 P. 46 : 8 P. 860 : 122 I. C. 244, the vendor is also entitled to interest at the rate which he has to pay to his creditor. 1934 A. 406 : 56 A. : 766 : 149 I. C. 781.

**Damages—by Supplying Inferior or Damaged Goods.**—Where goods which were delivered in pursuance of a contract, by sample were not equal to sample and the purchaser on taking delivery claimed compensation, the measure of damages is the difference between the market rate of the goods actually delivered and the market rate of the goods contracted to be delivered. 18 I. C. 986. When goods are damaged during transit, the measure of damages is the difference between the price of the goods in undamaged condition and their market value when they reached destination. 1930 L. 280 : 11 L. 227. In the absence of any condition in the contract especially providing for its contingency, the sinking or loss of goods is no defence to buyer's claim for damages. 1930 L. 193 : 125 I. C. 189.

**Damages for sale of Goods by Sample.**—Where goods which were delivered in pursuance of a contract by sample were not equal to sample and the purchaser on taking delivery claimed compensation, the measure of damages is the difference between the market rate of the goods contracted to be delivered. 18 I. C. 986.

**Damages in case of Contingent Contract.**—In case of contingent contract, the contingency on which the contract was to be enforced having occurred, damages have to be ascertained in the usual manner. 1922 N. 192 : 68 I. C. 720.

In the absence of any condition in the contract providing for a contingency, the sinking or loss of goods is not defence to buyer's claim for damages. 1930 L. 193 : 125 I. C. 189.

**Damages for Anticipatory Breach—Repudiation Before Due Date.**—When before the time fixed for performance the promisor repudiates the contract, the anticipatory breach takes effect as a premature destruction of the contract, rather than as a failure to perform it in its terms. 48 C. 727 : 1921 C. 185. When the defendant has repudiated a contract, the plaintiff may sue at once or wait till the time when the act was to be done. But the measure of damages in both cases will be the difference of the contract rate and the market rate on the date of the breach. 1921 L. 5. 78 : 66 I. C. 510. If the repudiation is not accepted, the measure of damages would be different on the due

date. 1931 B. 386 : 133 I. C. 861, 1928 P. C. 200 : 111 I. C. 4. If the repudiation is accepted, the account may be closed at the rate current on the date of repudiation and damages recovered on the basis. 1931 B. 386 : 133 I. C. 861, 1928 P. C. 200 : 111 I. C. 480. : seller gives notice of his inability to fulfil the contract before the date fixed for delivery, the measure of damages is the difference between the contract price and the price on the date when delivery should have been made. 30 I. C. 477. In case of a repudiation of a contract, damages are to be assessed according to the cost of performance, not at the time and place of the repudiation but at the time and place fixed for performance. 48 C. 427 : 43 C. 305. In case of anticipatory breach of contract involving deliveries in several instalments in several months, the measure of damages will be the sum total of the difference between the market rates at the appointed times for delivery in each month and the contract price. 43 C. 305. In case of anticipatory breach of contract, the party guilty of breach is not entitled to the return of earnest money. 1927 L. 721 : 101 I. C. 686.

**Damages for Defective Title.**—In a contract for sale of immovable property where there is a wilful default on the part of the seller in making out a marketable title, measure of damages will be the difference between the contract price and the market price at the date of the breach. 1929 L. 416, 38 C. 458, 32 B. 165, 92 I. C. 143, 21 A. L. J. 428. Where title of the vendor is found to be defective and the vendee is ejected by a third person, the damages would be the difference between the market value of the property on the date of the eviction and the price originally paid. 1930 M. 748 : 127 I. C. 617, 1929 L. 416 : 116 I. C. 419, 1921 L. 357 : 1 L. 380, 1927 N. 370 : 99 I. C. 313, 1924 N. 257 : 76 I. C. 451, 21 B. 175. Where there is a defect in title but the land is still in the possession of the plaintiff, he is entitled to such compensation as will compensate him for the defective quality of his title. 1928 B. 427 : 52 B. 888. When a vendor executed a security for damages and costs if his title was found defective and the suit of a stranger who was found entitled to the portion of a property was compromised by the vendee on payment of a certain amount, the vendee can claim this amount with interest. 1933 A. 455 : 136 I. C. 804. When the title was clear and the vendee realised from the contract of sale of land, the vendor was entitled to reasonable compensation for the breach irrespective of the fact whether he sustained any actual loss or not. 1929 M. 788.

**Damages for breach of Contract for Leases.**—When the lessor fails to give possession of the land leased to the lessee the measure of damages is the net profit which the lessee could have derived during the period he was out of possession. 53 I. C. 191 : 37 M. L. J. 385, 109 I. C. 335 (L.) 1925 R. 261 : 90 I. C. 635, 1925 L. 262 : 5 L. 527. If the contract for lease is invalid, the lessor is not entitled to enforce the contract but he can obtain compensation for the loss which has been caused to him by the continuance of the lessee in possession of the premises. 1933 L. 15 : 13 L. 561 : 140 I. C. 621.

### **Damages for Breach of Contract for Transfer of Immovable Property**

A person guilty of breach of contract is liable for damages whether the contract was one which related to the sale of movable property or immovable property. 40 M. 338, 1927 S. 49 : 97 I. C. 269 : 1927 S. 120, 21 B. 175, 53 I. C. 889, 37 M. L. J. 385. In a contract for sale of immovable property where there is a wilful default on the part of the seller in making out a marketable title measure of damages will be the difference between the contract price and the market price at the date of the breach. 1929 L. 416, 38 C. 458, 32 B. 165, 92 I. C. 143, 21 A. L. J. 428. The rule of English law that if a person who has

no title to a property nor has any means of acquiring it sells the same, the purchaser cannot recover damages beyond the expenses he has incurred, does not apply to India. 1925 L. 262 : 5 L. 527 : 85 I. C. 421, 40 M. 338, 32 B. 165, 11 B. 272, 1936 N. 4, 1933 N. 263 : 147 I. C. 1091. Where title of the vendor is found to be defective and the vendee is ejected by a third person, the damages would be the difference between the market value of the property on the date of the eviction and the price originally paid. 1930 M. 748 : 127 I. C. 617, 1929 L. 416, 116 I. C. 419, 1921 L. 357 : 1 L. 880, 1927 N. 370 : 99 I. C. 313, 1924 N. 257 : 76 I. C. 451, 21 B. 175.

### Mitigation of Damages

A plaintiff who sues for damages should take reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which results from his own neglect. If at the date of the breach, the plaintiff could do something which mitigated damages, the defendant is entitled to the benefit of it. 43 C. 493, 1932 P. C. 196 : 138 I. C. 658. Where the defendant failed to perform a contract but the plaintiff obtained the benefit of another contract which is of value to him, it does not entitle the defendant to the benefit of the latter contract. 43 C. 493 (P. C.), 1932 P. C. 196 : 11 P. 600, 1936 M. 47. The duty on the part of the plaintiff to minimize damages arises only after a breach has occurred. 28 C. W. N. 104. Plaintiff cannot claim any damages which are due to his neglect to take such steps, as not selling the goods within a reasonable time, *i.e.*, from the date of the breach until the price has fallen. 1925 B. 28 : 49 B. 25. The seller may show that for some time after the due date of delivery, that there was no available market for the goods. 1926 M. 1021.

### Illustration

(i) This was an action on a covenant respecting a bill of sale. The fact of the covenant was admitted. The opening of the case by the plaintiff's counsel created an excellent impression on the Judge in favour of the plaintiff's case. Even as the plaintiff's counsel was going on with the opening speech, the Judge asked defendant's counsel :—

"What answer have you got, Mr. Jones, to this action?"

"My Lord," says Jones, "with great submission, I should like to see my learned friend's case before I show him mine."

"Very well," says his Lordship, with a contemptuous toss of the head, "only it seems to me that you are bound by the covenant."

"I hope," says Jones, "to alter your Lordship's opinion, with great respect, when you have heard my case. At present my friend has not finished opening his."

"Oh, pray me, don't let me interfere," says his Lordship, "but it seemed to me this is a case that might very well be settled."

"Afraid not, my lord," persists Jones, with great submission.

"I say no more," despondently replies his Lordship, and the case proceeds.

The benevolent plaintiff enters the box.

He gives his evidence fairly and temperately. It seemed irresistible; and not to be got over or got round by any possibility of advocacy.

The following cross-examination by Jones will show the value of a perfect mastery of details, which enables him to master difficulties that are not organic.

Jones asks Mr. Hawk if he knew a person of the name of Isaac Jacobs.

The witness's answer is that he does not know Isaac Jacobs.

Q. "Do you say yes or no, Mr. Hawk?"

A. "I cannot say, it is so many years ago."

Q. "Let me help you. Was there a man who used at that time



to take possession for you under bills of sale, when you put in executions?" (The question has to be repeated). A. "I never did."

The learned Judge now begins to see there is something in the defendant's case.

Q. "You say Mr. Hawk," asks the Judge, "he never did?" A. "Certainly not, my Lord."

Q. "Look at this letter," continues the counsel. "Is it your writing?"

The letter was read—instructions to Jacobs to take possession of the goods the day after the assingment to Mr. Hawk.

Then the plaintiff foolishly said:—"But he never did take possession."

Another letter was put into his hand written by the plaintiff, asking for an account of the goods seized.

"Yes," says the plaintiff, "but as he did not give me an account, I conclude that he never took possession."

"One more letter and then Hawk may go; it is a copy of one written by Jacobs to Hawk, who does not produce the original, and upon it he has to confess that Jacobs wrote informing him that he had seized, but that the goods were of little value, and would not pay expenses." The result was, the case was lost. See Harris, pp. 24—27.

### Breach of Contract.

(ii) An action was brought by a colliery company against the defendant for £90. The defendant did not deny his liability but claimed against the company for a much larger amount for breach of contract in refusing to deliver 10,000 tons of coal during the year over which the contract extended, namely from September to September. The refusal to supply occurred in May. First the Manager of the coal company was called, and proved that the £90/- was owing; also that the contract was to supply at a certain price coals only to be delivered to a particular district west of Cockermouth. Hence the necessity of a Bradshaw map. All other coals were supplied not under that particular contract. That was the issue. And this is how it was proved by the witnesses for the coal company.

The counsel for the defendant was "alone" but seemed quite capable of taking care of his client's interests. He cross-examined the manager to this effect:

Q. Did the price of coals go up after the 20th September, the date of the contract? A. Oh, Yes.

"Let me take that down" says the Judge although of course Mr. Kee "objects" to the question without being able to say why.

Q. Did it continue to rise until the end of the year? A. "Quite so."

Q. The contract was signed on the 20th, was it not? A. On the 20th.

Q. Do I understand that the defendant was only to supply the district west of Cockermouth under that contract? A. That is so.

Q. But did you as a matter of fact deliver coals to the defendant's order to all parts of England? A. Yes. But I did not know it till some time after.

Q. But the plaintiffs must have known it? A. Yes, they did but I have since learned that these coals were not supplied under that contract.

Q. You learnt it from them. A. I suppose so.

Q. Can you tell me then under what contract they were supplied? There was no answer because there was no other contract.

Q. Were they delivered at the contract price? A. They were.

It was further proved that for 8 months coals were supplied places outside the District and that only one order was objected to by the Company. See Harris on Advocacy—pp. 76 to 78.

## CHAPTER 70

### In Suits on Money Bond

A suit on money bond is one of the most difficult ones to be defended in a law Court. The bond is generally written by a petition-writer and attested by two witnesses. It contains in the body of the bond a statement to the effect that money has been paid to the defendant and often attesting witnesses make a note to the effect that the money had been paid in their presence. The scribe and the attesting witnesses are produced to swear to the contents of the bond, passing of the consideration and to the proof of the signature and thumb impressions of the defendant. Even if the consideration does not pass, the witnesses have got to say that it did pass when a memorandum is made in the bond that the money has actually been paid to the defendant. The defendant has a very hard case to meet if he did not get the consideration. The cross-examiner should develop the following points :—(a) that the plaintiff was too poor to advance such a big sum ; (b) that the account books of the plaintiff do not show that the money was lent on the day of the execution of the bond ; (c) that the bond was a sort of security for the performance of some other contract ; (d) that the bond was a result or mis-representation, undue influence or fraud ; (e) that consideration of the bond was for some illegal or immoral purpose ; (f) that the defendant was legally disqualified to enter into a contract, *i. e.*, he was a minor or under Court of Wards ; (g) that the plaintiff was a professional money-lender and the defendant was a raw youth of profligate habits and was already indebted to him and under his influence.

**Illustration :—**The following incident narrated by Mr. Justice Sharwood in his work on Legal Ethics, illustrates a method that may be adopted by the cross-examiner with success. "He (a gentleman of the Bar of Philadelphia) allowed nothing that occurred in a case to disturb or surprise him. On an occasion, in one of the neighbouring counties, he was trying a case on a bond when a witness for the defendant was introduced, who testified that the defendant had taken the amount of the bond, which was quite a large sum, from his residence to that of the obligee, a distance of several miles, and paid him in silver in his presence. The evidence was totally unexpected ; his clients were orphan children, all their fortune was staked in this case. The witness had not yet committed himself as to how the money was carried. Without any discomposure, without lifting his eyes or pen from paper, he made on the margin of his notes of trial a calculation of what the amount in silver would weigh. When his turn to cross-examine came, he calmly proceeded to make the witness repeat his testimony step by step when, where, how and how far the money was carried, and then asked him if he knew how much that sum of money weighed and upon naming the amount, so confounded the witness, party and counsel engaged for defendant, that the defence was at once abandoned, and a verdict for the plaintiff rendered on the spot." See Hardwick on the Art of Winning Cases, 149.

## CHAPTER 71

### In Suits Relating to Insurance

In a suit for recovery of policy money, the chief question is whether the contract of insurance is complete or is not void on any other ground. The law is set forth below :—

A material mis-statement inducing to contract would avoid it. 1921 P.C. 195. When the policy requires that proof of the death of the policyholder

should be given, an Insurance Company cannot be ordered to pay the policy amount until such proof is given or if there are no rules, reasonable proof is necessary. 1929 M. 347: 121 I. C. 155. One of the conditions of a policy of fire insurance was that "if claim be made and rejected and a suit is not commenced within 3 months after such rejection, the policy shall be forfeited." Held that such a condition in a policy is a valid condition. But, for the condition to be operative, it must be shown clearly that there had been a repudiation. 1927 R. 195: 105 I. C. 301. A condition in a policy of insurance reserving the power of cancellation by Insurance Company at any time before the expiry of period is not necessarily void. 1927 S. 116: 101 I. C. 710. On construction of the proposal and the policy, it was held that the risk of the dividends not being sufficient to cover the balance of the premia was taken by the Company and that under the policy the Company was not entitled to deduct from the principal sum when it became due any sum which was still outstanding in respect of the balance of premia which at that time had not been in fact recovered out of the profits of the Company. 1925 C. 690: 52 C. 239. Knowing that they are entitled to a policy, the assured never cared to get it and know the conditions. Held, that they failed in their duty and the Insurance Company was not bound to keep assured informed. 1924 R. 517: 2 R. 144: 83 I. C. 59. A condition in a policy that if claim is not brought within a certain time policy would be forfeited, is valid and does not offend against Ss. 23 and 28 of the Contract Act. 1924 C. 186: 80 I. C. 637. Once the insurer refuses to accept the premium, the insured can sue him for damages or can dissolve the contract as the refusal is a continuing one. 32 I. C. 534. A nominee of assured is not a trustee and is not entitled to refund from the Company, to the exclusion of the insured as his executor. 1951 B. 526: 33 Bom. L. R. 720. When the husband of a lady supplied the premium but the name of the step-son of the lady was put as the person to whom the insurance amount was to be paid, the amount belongs to the son and not to the husband. 1922 L. 145: 89 I. C. 783. When under the rules of the Company, a policy lapses on default of payment of premium, it is not open to the defaulting policy-holder to recover the premium actually paid. But such a rule will not bind one, if made after he took up his policy. 43 M. 333: 55 I. C. 60.

An agent of Life Insurance Company cannot, after he is dismissed from service, claim commission for subsequent premium paid by customers secured by him. 44 M. 170: 60 I. C. 69. A covering note by an insurance agent is a mere contract to issue policy on receipt of premium before the vessel leaves harbour. If goods are lost, the owner should at once pay the premium and demand the policy. 32 I. C. 540. Policy contained a clause that the assured shall make a declaration of interest as soon as possible. Held, that it was a warranty and its non-fulfillment discharged the insurer from liability from the date of its breach. 1917 P. C. 257. Where in a contract of insurance the case is one of express warranty, the warranty still holds, notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud. 1921 P. C. 195. Where parcel was refused on the ground of shortage being in damaged condition and it contained stone instead of gold, it was held that the loss was before the refusal and that the consignor was entitled to recover on the basis of insurance policy. 1931 C. 285: 130 I. C. 131. When a policy recites that the representations are made a part of the contract, the truth of the statement is the basis of the contract. In such a case the question for the Court is whether the representation is true or not. Its materiality is not relevant. But if it is not contract, then the only question is whether the representation was material or not. 1931 B. 146: 55 B. 124. A contract of insurance, like any other contract,

is completed by offer and acceptance, and a pre-payment of the premium is not in law a condition precedent to the contract. But it is a common practice for all insurers, except marine, to stipulate that the contract shall not begin to take effect until the premium has been paid. 1935 B. 236 : 156 I. C. 634. Contracts of insurance proceed on the basis that every material fact is disclosed, and that the non-disclosure of every material fact entitles the other party to the contract to avoid the contract. What facts are material is a question of fact in each case. 1936 S. 223. In case of insurance, the acceptance of the premium by the Insurance Company does not itself show that the company has accepted the offer. It is essential further that the premium should have been fixed. Until it is fixed there is no completed contract. 1924 R. 219 : 83 I. C. 569. If the premium is fixed, the insurance is effected, although no policy was delivered. 1929 R. 160 : 33 I. C. 569. It is not necessary to prove that an Insurance Company's prospectus containing conditions of insurance, and referred to in the policy had been read by or specially brought to the notice of the assured. The prospectus will be a part of the contract of insurance, and will have the same effect as if it had been reproduced in the policy itself. 25 M. 183 (205). A policy of insurance was sent by mail agent from Madras, who was not authorised to accept proposals, which could only be accepted by Directors in Calcutta. Held, that the insurance was effected in Calcutta and not in Madras. 1933 M. 764 : 145 I. C. 598. Where there is a clear acceptance of the proposal on the receipt of the premium, the fact that contingency covered by the insurance happened before the policy arrived should not be a valid defence open to the insurance company. 1934 A. 298 : 43 I. C. 522. As to Life Insurance, Fire Insurance, Motor Insurance, Rights of Nominee of Policyholder, Rights of Assignee, etc., see *Prem's Laws of India, 1840—1940*, pp. 2293 to 2308.

### Illustrations

(i) A suit was brought to recover the insurance on a large ware-house full of goods that had been burnt to the ground. The insurance companies had been unable to find any stock book that would show the amount of goods in stock at the time of the fire. One of the witnesses to the fire happened to be the 'plaintiff's' book-keeper, who in his examination-in-chief testified to all the details of the fire, but said nothing about the books. The cross-examination was confined to these few pointed questions :—

Q. "I suppose you had an iron safe in your office, in which you kept your books of account?" A. "Yes, sir."

Q. "Did that burn up?" A. "Oh, no."

Q. "Were you present when it was opened after the fire?"

A. "Yes."

Q. "Then won't you be good enough to hand me the stock-book that we may show the jury exactly what stock you had on hand at the time of the fire on which you claim loss?"

(This was the point of the case and the jury were not prepared for the answer which followed.) A. "I haven't it, sir."

Q. "What I haven't the stock-book? You don't mean you have lost it?"

A. "It wasn't in the safe, sir."

Q. "How was it that the book wasn't there?" A. "It had evidently been left out the night before the fire by mistake."

The jury at once inferred that the books were suppressed.

(ii) Hawkin was once retained for an insurance company. The plaintiffs were clothiers who sold ready made clothes and their premises having been burnt down, they made enormous claim against the Insurance Company. Hawkin having elicited that there were piles upon piles of trousers and near all of them had brass buttons, commented on the fact that in spite of careful sifting of the debris, not a button had been found among the salvage.

The Court adjourned till the following morning when hundreds of buttons, partially burnt, were brought into Court by the Jew plaintiffs. The Judge inspected the buttons and enquired how Hawkin accounted for them after having stated that none had been found.

"Up to last night, My Lord, none had been found." "But," said the Judge "these buttons have evidently been burnt in the fire. How do they come here?" "On their own shanks, My Lord."

The Judge and the jury agreed on a verdict for the defendants. See *M. L. J.* 209.

## CHAPTER 72

### In Theft Cases

In theft cases a number of questions involving complicated points of law and fact arise and an experienced counsel will always find some loop-hole to get a verdict of not guilty. The following points must be borne in mind while cross-examining witnesses for the prosecution :—

**Possession of Property :—**The first element in a theft case is that the complainant must be in possession of property. If the owner had already given up the possession of the property which is the subject of theft, there can be no conviction for theft, e.g., a bull set at large which becomes *res nullius* 8 A. 51, 9 A. 348, 17 C. 852. Again if the bullock had gone astray, e.g., where a bullock followed a cow and the owner gave him up for lost, the accused whose possession it was found afterwards is not guilty of theft although he can be convicted under S. 403, Indian Penal Code, for having mis-appropriated it. 38 I. C. 332. But if some time had elapsed from the loss and the possession of the accused, he is not guilty even under S. 403. 1 I. P. C. 15 P. R. 189; 62 Bom. L. R. 1916. The taking of the property is not necessarily a theft unless it was taken out of the possession of the other. 44 C. 66, 22 I. C. 76. There can be no theft if the taking is from joint possession, unless the possession becomes exclusive of the other. 10 M. 186, *contra* 1926 Bom. 12. Ownership of the complainant must be proved in such cases. 1924 R. 91, 2 Cr. L. J. 618.

**Bona-fide Claim by Accused :—**If the property is taken by the accused under *bona fide* claim of right even against the will and consent of the complainant, it is not theft, even though the claim be ill-founded in law or in fact. 1924 P. 25, 1929 P. 86, 44 C. 66, 1927 P. 385, 1935 A. 214, 1935 C. 675, 1926 L. 683, 1923 M. 239, 1935 Sind 115. But if the claim or right is a mere pretence, he can be convicted of theft. 1929 O. 84, 1930 A. L. J. 457. It may be noted that the forcible removal of goods from the debtor's possession by force to compel the debtor to discharge the debt is theft. 1925 L. 131, 25 Cr. L. J. 650, 1930 B. 167; *contra* 1921 I. 390, 22 Cr. L. J. 673, 14 C. W. N. 936. If crops are grown by accused removal by him is not dishonest. 1947 P. 74.

**Identification of Stolen Property :—**Unless the stolen property is fully and satisfactorily identified, there can be no conviction for theft or receiving stolen property. See Chap. 47.

**Exclusive Possession :—**If the stolen property is found with the accused, it must be established that he had the exclusive possession of the same because there can be no conviction without such exclusive possession. See 1934 R. 80, 6 B. 731. 1936 P. 534.

The following decided cases will be found useful :—

An ornament (*kangni*) was found in a jar of chillies in a house occupied by the accused and his mother. There was nothing to show that the accused put it there or knew that it was there. He could not be convicted under S. 411. 94 I. C. 909 : 27 Cr. L. J. 717. Stolen property was found in the dung heap situated in the court-yard of the house belonging to several persons. None of them is guilty as it could not be said with certainty as to who was in exclusive possession. 92 I. C. 425 : 27 Cr. L. J. 429. When the property is found in a room with no shutters and accessible to the members of the accused family there is no exclusive possession. 1925 A. 478 : 47 A. 511 : 26 Cr. L. J. 1022, 15 A. 129, 22 A. 445. Accused was not only a joint owner of the shop but also had a key. The lock of the shop was open on the day the property was recovered. He was guilty. 74 I. C. 271. Where in a house occupied by several male and female members of a joint Hindu family, a locked bag containing stolen property was found, the key of which was produced by the wife of a member who was in the house at that time. The husband was prosecuted under S. 411. Held that the mere fact that the actual possession was with the wife, it cannot be presumed that it is *per se* the possession of the husband. He is not guilty. 1922 A. 83 : 67 I. C. 338 : 23 Cr. L. 386. If the house is occupied by several persons and stolen property is found there, nobody is guilty unless there is evidence of exclusive control. 57 I. C. 913, 67 I. C. 588, 1922 A. 83 : 67 I. C. 338, 4 Cr. L. J. 484, 1946 P. 169, 1945 A. 230. In case of stolen property being found in the house occupied by joint Hindu family, manager is liable. 58 I. C. 341. Where the property is found in a house occupied by a joint family none of them can be said to be in exclusive possession of it. 57 I. C. 913 : 54 I. C. 245—48, 1922 A. 83 : 67 I. C. 338, 67 I. C. 588, 4 L. L. J. 484. Head of the family is liable. 29 A. 598, 1930 L. 884. Accused was convicted for the theft of the bullock whose skull he pointed out buried in land which was not in his exclusive possession, and the shed in which it was found was in possession of several persons. Held, that he is not guilty. 196 P. L. R. 1905, 5 L. L. J. 325, 73 I. C. 331. Accused admitted having thrown the corpse of a boy into a tank and produced ornaments which the boy wore from a hole near the tank. The accused was convicted under S. 411 although the charge was one under S. 302. 22 A. 445, 6 B. 731. Even where accused is an adult male member of the family it does not necessarily follow that he was in possession of the stolen property. The exclusive possession must be traced to him. 8 C. W. N. 22. Exclusive possession can be proved by evidence of exclusive control as where the separate room is allotted to the individual member of the family for which he possesses the keys from where the property was recovered. 29 A. 598, 40 C. 990. Stolen oxen were taken to the well of the accused and put up there for the night and subsequently accused promised to have them restored to the complainant but did not do so. Held, that he is not guilty as the oxen were not taken to his well with his knowledge. 145 P. L. R. 1905. Accused was the head of the family of which the only other male member was his son. The stolen watch found in his house was worn by his daughter and the *chadder* was concealed in thatch of his house, where he lived. Held, that he is *prima facie* responsible as being in possession of them. 21 Cr. L. J. 757. Stolen cloth weighing five maunds found locked in a joint Hindu family house. The key was with the son who was manager also. Held, he was guilty. 29 A. 598 : 9 P. 606.

Two men were bringing goats and when questioned they claimed them falsely to be their own. Both were guilty under S. 411. 1933 L. 148 (1); 34 Cr. L. J. 604, 1942 A. 776 : 26 Cr. L. J. 188. Dist. Stolen property found in a house occupied by family cannot be assumed to be in the possession of head or any number of the family. 1933 A. 437 : 34 Cr. L. J. 930. In order that presumption under S. 114 (a) Evidence Act, may arise, possession must be shown to be exclusive and recent. 1934 R. 80 : 35 Cr. L. J. 994, 1929 S. 9 : 111 L. C. 732, 6 B. 731. House was occupied by two brothers, but stolen property was found with younger brother. The elder is not liable merely because members of criminal tribe visit him. 1936 P. 534. Even if accused is in sole occupation of the room, he cannot be taken to be aware of all articles found in the room. Court must consider whether it was reasonably possible for other persons to introduce the article. 1942 C. 440.

**Suspicion in Theft Cases.**—When the house of a person is broken into, he readily jumps to the conclusion that it is the work of his enemies. Without any positive evidence he at once names his enemies and their relations as suspects in the case and thus feeds fat the grudge. It has been held in number of cases that even the gravest suspicion against the accused will not suffice to convict him unless evidence establishes the guilt without doubt. 1935 C. 304, 137 I. C. 163, 1930 O. 321 : 31 Cr. L. J. 1078, 137 I. C. 290, 26 I. C. 329 : 25 I. C. 843, 1931 L. 406, 1922 P. 88. Theft are generally committed at nights and there is hardly an eye-witness. It is therefore essential that connection between the accused and the crime must be established satisfactorily. Section 114 (a), Evidence Act, lays down that if a person is found with the stolen property soon after the theft he is presumed to be either a thief or receiver of stolen property. See also 1934 A. 455, 1931 C. 617, 1930 O. 353.

### Illustrations

(i) A man was charged with burglary. Now here are the facts presented by the witnesses:—"A man was seen coming from the back door of a place in Toronto, late at night, within the burglarising hours, his identification, there was not much of question about that; his manner and conduct was such as to cause comment by the officers who took him in charge; he was evidently in great haste to escape from the house; he was arrested, unable to give any satisfactory account of himself at the moment, and some tool or other was found in his coat pocket; the man was arrested and charged with burglary—the case of the Crown apparently absolutely complete. Now that man might have been convicted and might have served his term—a perfectly plain case; but it developed on the the cross-examination of certain witnesses for the Crown, and upon the evidence which was given for the defence that this was what happened:—That this man was friend of the servant of the house; that he had been there spending the evening; and by some accident or another he had left the door open; that he was a man of very excitable temperament, and that he had, just before leaving, a row with this servant; he was running to catch a car because it was late at night, and he had to catch one before a certain time; that he was a mechanic, and he had a certain implement, a wrench or something of that kind, in his pocket at the time of his arrest. In the witness-box, the witnesses swore to damaging evidence, and the outward facts seemed to be perfectly honest, but they were at the wrong angle; the witnesses had received these impressions through a wrong perspective, and the result of it was, as I understood the case, that had it not been for the righting of the evidence in that way or in some other way, the man would have been convicted. 20 M. L. J. p. 281."

(ii) It has been observed in a number of theft cases that a villager will catch hold of his enemy or some person against whom he owes some grudge with the help of some of his relations, when he see him going alone in the evening. The man is given a good thrashing and then bullock is made to walk before him. Some alarm is then raised and in the presence of respectable persons he is arrested and beaten. In India, it is customary to thrash a thief. He is made to sit at night in the house of some lambardar, a watch is put over him and he is taken to the Police Station, along with the bullock, dang and the ready made witnesses. The poor victim is quite friendless and penniless and therefore his feeble attempt to plead his innocence absolutely fails. In majority of cases, he fails to establish, why he was passing through that village or that the case was mere fabrication.

(iii) A man was charged with stealing a horse. He was found riding the animal into a market town some three or four miles away from the meadow where the horse had been turned out to graze. A policeman stopped him and took him and the beast in charge.

*Cross-examination*.—There was a gap in the hedge of the meadow where the horse had been feeding, which abutted on the highway. The horse was going very fast when the policeman met him. (Artful policeman made him so at a terrific pace. These police officers are so subtle in the witness-box).

There was a halter round the neck of the animal, to which the prisoner was holding. Prisoner did not stop when policeman shouted out.

Q. "Did the horse?" A. "No, Sir."

Q. "Horse knew the town well, did he not?—Was accustomed to be put up at an inn there and baited?" A. "Can't say, Sir."

Q. "Can't say: don't you know it as a fact?"

A. "I believe he did, but I don't know."

Q. "You have said the prisoner gave no account of how he became possessed of the horse?" A. "No, Sir."

Q. "Did he not say he had come long way that morning?"

A. "He did say that, Sir."

Q. "(Look this way if you please policeman)!"

[It is always better for men who are engaged in a personal contest (pugilistic or otherwise) to look each other in the face].

Q. "Did he not say he had been looking after work at the town of H—?" (Policeman laughs, and strokes his chin.)

A. "I don't think he did,"

Q. "Don't think he did; are you sure he did not?" A. "I aint quite sure, Sir. I think he said he had been looking after work."

Q. "Yes, and that he had not got any that day?" A. "He did, Sir."

Q. "And was returning to W—?" A. "He did say that, Sir."

Q. "Where was it he said he had been after work?"

(Policeman hesitates, and again rubs his chin, this time with effect, for he says.) A. "I think he did say the town H—Sir."

The jury smile at one another, and shake their heads. This looks only like equivocation on the part of the active and intelligent one.



Q. "How far is the town of H—from the town of W—?"

A. "A matter of fourteen miles, Sir."

Q. "Did he say he had walked all the way?" A. "He did."

Q. "And was tired?" A. "He might have done."

Q. "But did he?" A. "Well, I believe he did, Sir."

Q. "And that the horse was feeding in the highway?"

A. "Yes, he said that, I believe."

Q. "Believe; but you know he did?" A. "Well, he, did."

Q. "And that there was a bit of halter on its neck?"

A. "I believe he did say something of that sort; but I won't be sure."

Q. "Oh, yes, you will be quite sure, try again!" A. "Well, he did."

Q. "And that he got up to have a ride?"

(Policeman sees the drift at last and grins, jury smile, everybody smiles, including judge.)

Judge.—"Did he say so?"

Witness.—"He might have done, your honour (with a big H.)"

Q. "And that the horse ran away with him?"

(Here there was a roar of laughter, at which the intelligent one shakes his head.)

A. "He was running away, you know?"

Policeman (laughing); "He was that, Sir."

Q. "Who was running away?"

(Policeman, after considerable hesitation and chin-stroking, and amid great laughter.) A. "The horse I suppose, Sir."

Q. "And did he say he could not stop him because he had not the cord in the animal's mouth?"

A. "I believe he did, I won't be sure."

Q. "Why not be sure? He said it, you know."

A. (Vehemently) "Well, he did; if you like to have it, Sir."

Verdict, acquittal. See Harris's Hints on Advocacy, p. 254, 12th Ed.

(iv) This was the case of a policeman who was indicted for stealing the sum of nine shillings and ten pence half-penny. The facts deposed to by the witnesses were as follows: In company with a sergeant of the regiment, he had arrested a deserter, and after delivering him up to the authorities, went into a public house and called for two glasses of ale. On being served, he paid three penny pieces to the landlady. At this time a man whom I will name Lounger was standing with his elbow leaning on the counter, and almost facing the prisoner and the sergeant. He also had some ale before him. While these persons were in front of the bar, a woman came in, called for a glass of ale and placed on the counter a half sovereign. The landlady took the coin into a parlour behind the bar for the purpose of getting change. Meanwhile the woman took her ale and went into a room on the opposite side of the bar. After a minute or so had elapsed, the landlady returned with the change (the sum in question), consisting of silver and copper, and placed it on the counter between the policeman and the sergeant, where it lay for about five minutes. The landlady, who was a respectable woman, and unimpeachable as a witness, after

swore that after the lapse of that time she saw the policeman take up the change and put it in his pocket. She made no remark as he did so, because she had forgotten whose change it was. The soldier and the sergeant then quickly finished their ale and went away. In about a minute or so the woman to whom it belonged came to the counter and asked for her money. Upon that, the landlady immediately calling to mind the circumstances, exclaimed, "Why, the policeman has got it!" Lounger then, aroused to the liveliness of the situation, said, "Yes, he has: I saw him take it." Upon this they all went to the door, and the sergeant, who lived in barracks nearly opposite, was not in sight; but the policeman was seen going along some hundred yards from the house. Lounger was then told by the landlady to go and bring him back. Instead of Lounger going to the police constable, it appeared that he went to the sergeant. And the landlady, before the Magistrate, had said no more than that she sent him to the prisoner, but did not see him again till nearly nine o'clock at night. (This point should be borne in mind.) Lounger's evidence in addition to his saying that he saw the money taken, was, that he went to the sergeant and then returned to the public house, and afterwards went after the prisoner, whom he saw at the police station; that he gave information against him, upon which he was taken into custody. The sergeant was called and said that he saw the money lying on the counter a minute before he and the prisoner left the house. He could not say if it was there when they left. This was the case for the prosecution. Upon this evidence it looked somewhat hopeless. If either of the two witnesses, the landlady or Lounger, could be believed, there was no answer to be made.

There were no witnesses in fact for the prisoner. The defence, therefore, must rest upon the cross-examination and the improbability of the story being true, arising mainly from the good character of the person charged.

The following were the points made in cross-examination, and the reader will do well to remember the exact facts narrated above as given in the evidence-in-chief.

1st.—The woman who had given the half-sovereign was cross-examined.

Q. "Who was in the bar when you went in?" A. "No one, I believe."

Q. "You placed the half-sovereign on the counter?" A. "I did."

This was the whole of her evidence.

2nd.—The next witness cross-examined was the landlady.

Q. "How long is the counter?" A. "Five feet."

Q. "Who came into the house first?" A. "Lounger."

Q. "Who next?" A. "The two men."

Q. "And then?" A. "The woman."

Q. "Did the men come to the counter as soon as they came in?"

A. "Yes, The woman may not have seen the men when she came in."

Q. "Why do you say that?" A. "No answer."

Q. "Do you know that the last witness has sworn?"

A. "She may not have seen them."

This observation on the part of the witness doubtless arose from the fact that she had talked the matter over and knew she was contradicted upon the depositions. It was, of course, not further pursued on behalf of the prisoner. The point was made, and being taken in connection with the want of memory of the prosecutrix, as to whom the change belonged, was not without value.

Q. "Were there glasses on the counter, between you and prisoner?" A. "There were."

Q. "And the handles of the beer engine?" A. "Yes."

Q. "Six of them?" A. "Yes."

Q. "They would reach two-thirds of the way along the middle of the counter?" A. "Yes."

Q. "Did you leave the bar after the prisoner and the sergeant were gone?" A. "I did."

Q. "Who was left?" A. "Longer."

Q. "And no one else?" A. "No one."

Q. "Were you busy serving other customers in other parts of the house while the money was on the counter?" A. "I was."

Here I should pause a moment to call the reader's attention to a somewhat common blunder which might have been made by a very inexperienced counsel. The temptation to ask the following question would have been very great to beginners: "Might not some one else have taken it?" The answer would have been "No!" with much emphasis. This was a matter of argument for the jury, and unless you cut the ground away from you by putting such a question, there would arise a strong inference that some one else might have taken it.

The next question was—

Q. "Did you send Lounger after the prisoner?"

A. "I sent him to the sergeant."

Q. "Is that the same as you deposed before the Magistrate?"  
A. "It is."

Depositions produced, found to be not the same. It was then stated in accordance with last question, which makes something more than a slight discrepancy; the effect of it on the jury being not unimportant.

Q. "That is what you swore?"

A. "It is; but I sent him to the sergeant, not to the prisoner."

Here is not only a contradiction but an improbability, as well as an unreasonable piece of conduct; all of which the jury notice, as becomes them.

Q. "Did you authorise Lounger to give the policeman into custody?" A. "Certainly not!"

Q. "Nor to take any proceeding against the man?" A. "I did not!"

With at least two notes of indignation, Lounger is next cross-examined, and states that he was sent to the sergeant and not to the prisoner.

Asked what the latter did with the money after he had taken it from the counter, he said: "How do I know? He might 'a put in his 'at for what I know!" This was a foolish answer for the prosecution, but I am inclined to think that one or two stupid-looking questions had worked Lounger into giving a stupid answer, as will sometimes happen.

The sergeant was cross-examined simply as follows:—

Q. "You have been in the army many years?" A. "Ten."

Q. "And have risen to the position of sergeant?" A. "Yes."

Q. "Were you on duty on this day with the prisoner, in apprehending a deserter?" A. "Yes."

Q. "You stood close to him and were talking while the change was lying on the counter?" A. "Yes."

Q. "Did he touch it?" A. "I never saw him."

Q. "Could he have taken it up without your seeing him?"

A. "He could not."

*See Harris on Advocacy.*

(v) William Brodie's trial is interesting for its own sake. Rarely does a determined burglar, who by his nightly exploits fills the townfolk with nervous dread, double that part with the career of a leading tradesman and member of the town council.

In this case the interest is heightened by the circumstances. He was arraigned in Edinburgh in the days preceding the French Revolution, and tried before Lord Braxfield, that legendary figure who lives again as Weir of Hermiston in Stevenson's unfinished masterpiece according to the procedure so interesting to Southerners because its appearance differs so much from English criminal procedure. The Judges, who not only are addressed as "My Lord," but assume the titles of the peerage, though they remain commoners, wear judicial raiment which seems strange to those who know only the Judges of Assize. The prisoners are called the penal. The jurors number fifteen, including a chancellor who is the English foreman. The counsel too hold offices with designations unknown to the southern realm, and all the speeches come at the end of the trial. The case, too, was marked by a sensational incident, when the formidable Lord Justic Clerk, whose frown daunted the boldest advocate, was defied, and with success, by a young barrister of but three years' standing. And the chief figure in the drama when he came to die was hanged on a scaffold which but for mere chance he himself would have made, and which was, in all probability designed by him. The prisoner had always lived a double life. His parents were born of respectable families. Both his grandparents were writers to the signet (or solicitors as they would be called in England). His father was a wright, in substantial business, a freeman of the city, deacon (or head) of his trade guild, and a valued member of the City Council. William was the eldest of eleven children, of whom only three survived to any age. He was born on 28th September, 1741, and his father proudly recorded the momentous event in the family Bible, from which another member cut the entry when, through this child, shame and disgrace made them bow their heads.

William was brought up to his father's trade and became a freeman of Edinburgh on 9th February, 1763. He lived at home and conducted himself in business as a model young man, but his evenings were given to frivolity and debauchery. Like so many of his age, he was addicted to gaming and frequenting of cockpits, and his habits must have involved him in more expense than even the son of a leading tradesman could afford. In addition to those expensive amusements he assumed obligations of a more permanent nature. He never married, but he was often absent from his home in the society of one of his two mistresses, both of whom he maintained in separate dwellings where they reared the children they bore him. By one of them, Anne Grant, he had three, two girls and a boy, and by the other Jean Watt two boys. A curious fact is that neither did his family know of these liaisons nor did either mistress suspect a rival. It

was by writing to Anne Grant that he was traced. It was by the evidence of Jean Watt that he hoped to escape the gallows. When and how he began his career of crime has never been discovered. In August, 1768, the bank was entered by a false key, and the thief escaped with his booty. Year afterwards, when he had been unmasked, people remembered that Brodie had been employed by the bank to do repairs there shortly before the theft. They called to mind that his occupation called him into many houses and that he had abused confidence by taking impressions of keys, and drew the conclusion that this undiscovered crime must be laid to Brodie's account. Others, too, remembered that they had seen him in suspicious circumstances. These stories may be discounted. Wisdom after the event is easy and none of the gossips had breathed a word before the trial.

Meanwhile he followed his worthy father's career. In 1781 he entered the City Council as Deacon of the Guild of Wrights, and held the office in 1781 and 1782. Next year he was a Trades Councillor. In 1786 and 1787 he was again Deacon. His father had died in 1782 at a very old age, and left him an ample fortune but it was soon dissipated. In 1786 he was in embarrassed circumstances though he claimed to be solvent. During the latter years Edinburgh was the scene of a number of mysterious burglaries, daring and successful. No arrests were made, but this is not surprising since the watch was composed of aged and inefficient men who could never at any time have been an adequate police force. It does not follow that Brodie was the offender. There were many living in the lands of Edinburgh, both able and willing to commit such crimes. The impunity with which they were committed permits the inference that the criminal, whatever he was, knew intimately the habits of the victims. Perhaps the very ease and impunity with which the early burglaries were committed led him to reflect whether he too might not repair his falling fortunes, the more so because the victims often called on him to devise more secure methods of baffling marauders. It is not till 1786 that definite information of his crime is forthcoming. In July, 1786, an Englishman named George Smith, employed as a travelling hawk, came to Edinburgh. He lodged at a tavern in the Grassmarket kept by Michael Henderson, and there met two doubtful characters, Ainslie and Brown *alias* Moore. The last-mentioned was an Englishman who had escaped while under a sentence of transportation inflicted upon him at the Old Bailey in 1784, and was concealing himself in Scotland. Brodie was a frequenter of the tavern, and according to Smith proposed to the latter that he should join in a series of burglaries. This proposal was apparently put forward because Smith had worked as a locksmith and seemed not disinclined to a nefarious life. In November, 1786, they began, so Smith said, but in October an important robbery had taken place which was afterwards believed to be Brodie's work. To cover Smith, Brodie found him a small grocer's shop. Thereafter the two worthies committed regular inroads on tradesmen who kept goods of a kind coveted by thieves of great value in a small bulk. Of course a receiver was essential, and since from the commencement they went, apparently as a matter of course, to an exiled Scot in England, it is a reasonable inference that Brodie was well established and was only increasing his operations by the aid of the locksmith. In the course of 1787 the two were aided by Ainslie and Brown and the partnership was complete. In October they caused a great sensation by stealing the silver mace of the University. In January, 1788, the shop of some silk mercers at Edinburgh Cross was raided. As in the case of the

mace, a reward was offered, and this time it was announced that any accomplice who could procure the arrest of the guilty parties would receive a pardon. For some time the offer seemed to be as useless as the rewards, but it had not escaped Brown's attention. He did not avail himself of it at the time, but he stored it in his memory. The offer had peculiar attractions to him. He alone could, if recognized, be seized and sent away without trial, being an escaped convict. At this time, Brodie's credit with his townfolk received a blow. The four whiled away their time when one evening with a stranger, Dice were produced and the stranger lost heavily. He did not like this and seized the dice, which proved to be "loaded." He at once lodged an information, but after wordy warfare the dispute seems to have been adjusted and no more was heard of it. In March, 1788, the gang conceived a more daring exploit. They planned to rob the Excise Officer in the Canongate. Brodie knew the buildings well, because he was often called in to effect repairs, besides, a distant relation was in the Excise and had come to Edinburgh at times to the office. Brodie was most kind and hospitable on these occasions. He even went so far as to accompany his relative to the office and there was able to glean more information. Like most Government offices, it was deserted after office hours, only a watchman being on duty.

The plan being pronounced feasible, the preliminaries began. Brodie and Smith called to make inquiry for his relative. While Brodie was thus attracting attention to himself, Smith took an impression of the key of the outer door. He was then easily able to make the necessary duplicate. Ainslie meanwhile was watching the watchman to learn his habits and he found that every night from eight to ten the office was left unguarded. On 4th March they met to make their final preparations, and the attempt was fixed for the next evening. On that day Brodie had a dinner party. He was dressed in his usual day attire, a suit of white, and presided over the party from three till eight o'clock, when the last guest departed. This rather upset the plan, as the four had fixed to meet at Smith's house at seven o'clock. As soon as he was free Brodie changed into black and hurried off to the rendezvous. In spite of the cold and snowy weather he was in high spirits, and burst in on the apprehensive three, singing. "Let us take the road," a song from the "Beggars Opera" the play which seems to have been his favourite. Then they seized their tools and weapons and furnished with masks set forth to the Excise Office. Ainslie was to watch outside the building, and if alarmed was to blow a whistle. Brodie was to go inside but lurk in the hall, also charged with the duty of watching. Brown and Smith undertook the forcing of the doors and desks. Accordingly Ainslie went first. Then Smith, who at once got to work and was inside when Brodie arrived. Brown was still on his way, so Brodie went to find him. He soon came, explaining that he had followed home the office-keeper who locked up, so as to avoid a surprise. Brodie then took up his post and Brown joined Smith. The two made a poor haul, not more than £17 is all and, as so often happens, overlooked the place where a much greater sum was kept. As they were searching they heard the front door open, but paid no attention, and completed their task. As they were about to go, someone ran downstairs and hurried out, closing the front door with crash. The two became alarmed, especially when they found that Brodie was not at his post. Ainslie, too, had disappeared. He had been watched by a servant girl, though he did not know it. His absence was due to the fact that someone hurried past him into the building and then at once someone else ran out and fled into the street.

After a minute another came and slammed the door. He whistled and fled. It was Brodie, whose nerve had given. Mr. Bonar, the Solicitor-General, was the mysterious stranger. He was hurrying to get a paper which he had left in his room. As he went in, Brodie bolted. Mr. Bonar thought he was a clerk and went on, and finding the paper, went away. Ainslie, Brown and Smith met again at the appointed place, but Brodie did not turn up. He was busy establishing an alibi. He had rushed home, changed and then went to Jean Watt's house, where he spent the night. Next day he met his associates, who made no secret of their annoyance. On the second day they shared the swag and sent Mrs. Smith off with the booty previously garnered, which had to be disposed of through the fence. The town was by then ringing with the news, and Brown had been thinking hard. That night he saw the Procurator-Fiscal and told his story. For some reason he only mentioned Smith and Ainslie, who were arrested the next day. It was not long before the news reached Brodie that arrests had been made. He could not know how much information was available, and with a courage which contrasts strangely with his flight on the occasion of the crime, he went round to the Tolbooth as a disinterested citizen curious to the notorious criminals. He failed, because strict orders were given that no one should see them. This failure induced him to flee. He did not know that no one as yet had mentioned his name, but, knowing his associates, he must have concluded that nothing but a miracle would prevent them doing so. So on the Sunday he went. As soon as Smith heard of his flight he made a confession implicating Brodie. Ainslie followed suit, and a hue and cry ensued. The Officials traced him to London but lost him there. Brodie declared afterwards that he saw his pursuer several times in London, but, be that as it may, the search was abandoned. He had made his way to Holland, but entrusted letters to his fellow voyagers, who on arriving in Scotland, at once connected him, who was known to them as Dixon, with the missing Deacon. After some hesitation they opened the letters, which left no doubt of his identity. These letters were eventually delivered to the authorities, who at once sent after him. The imprudence in sending the letters was matched by the folly of their contents, some words leaving little doubt as to his guilt. He was traced to Amsterdam, where he was taking lessons in the art of forgery preparatory to commencing life anew in America. He was seized, extradited and taken to London, where the magistrate at Bow Street committed him to prison pending removal to Scotland. He reached there on 17th July, 1783, after a remarkably quick journey of fifty-four hours from London. Smith had relieved the monotony of gaol by a daring and almost successful attempt to escape which Ainslie shared. Brown had been unfortunate enough to be arrested for murder, and so all four were in prison. The authorities could not easily obtain the conviction of all four. Brown had earned a pardon, but could not give evidence, since a convicted felon was not then a competent witness. To render him available, he was given a pardon for all his crimes, and so he became available. Smith endeavoured to obtain liberty by confessions, not only of crimes committed but of crimes in contemplation of which he gave a remarkably detailed programme. It was in vain, but Ainslie did find favour, and so the two chief culprits were charged, while their meaner-spirited associates purchased life at their expense.

The trial commenced early on 27th August and proceeded continuously until the jury retired after a sitting of twenty-one hours. In the afternoon of the 28th August, the Court reassembled after a short adjournment to receive the verdict. There was in those days a general idea that a trial

for felony should not be adjourned and protracted sittings frequently wearied Judge and the Jury and counsel, and inflicted mental torture on the accused. There were five Judges. Lord Braxfield, the Lord Justice Clerk, presided, and was accompanied by Lord Hailes, Lord Eskgrove, Lord Stonerfeld and Lord Swinton. A distinguished Bar had been retained; the Lord Advocate, the Solicitor-General, Mr. Tait and Mr. Murray for the prosecution; the Dean of Faculty (Erskine), Mr. Wight, and Mr. Hay, for Brodie and Mr. Clerk and Mr. Hamilton, two unknown young advocates, for Smith, whose case was hopeless. Both prisoners pleaded not guilty. Proceedings started with a technical objection by Mr. Wight, but after argument the Judges brushed it on one side. After they had given their decision, Mr. Clerk rose to object, but Braxfield ruled him out. This time he subsided. A long string of witnesses then entered the witness-box one after the other to prove the links in the evidence. Disputes broke out when the eighteenth witness was called. She was Smith's wife. Clerk at once objected. The Lord Advocate said that she was only called against Brodie, but as Clerk promptly pointed out, if her evidence implicated one it must necessarily implicate the other. The Judges over-ruled him. He began again. Braxfield denounced his conduct as indecent and intolerable, but the Dean of Faculty asked for indulgence for a young gentleman, and he was allowed to proceed without avail. When all this pother was over, the witness was brought in and Mr. Wight objected on the ground that she was Mary Hubbart and the indictment revealed only a "Mary Hubbard or Hubbart, wife of George Smith." The Court did not like the objection, but it turned out to be a tact, and reluctantly the Judges decided that she was not competent, and the Lord Advocate withdrew her. Thus justice was done on a technicality. The nine of witnesses continued. Number twenty-six was Andrew Ainslie, and objection was at once taken that he was an accessory who had been promised freedom if he would give evidence. The prosecution denied the agreement, and alleged that an accomplice was by Scottish law a competent witness. The objection was over-ruled and Ainslie detailed the story of the crime. At one stage he was asked about a £5 note, but the defence objected. The indictment had mentioned a bank-note, but the document was issued by a private bank, and was therefore in law not a bank-note. The Solicitor-General denounced the objection as frivolous, but it was upheld. The cross examination was slight, principally directed to times with a view to Brodie's alibi. Next came John Brown, *alias* Humphrey Moore. He was promptly objected to as infamous. The Solicitor-General countered by producing a pardon under the Great Seal. The defence persisted. The pardon might save him from the penal consequences, but the infamy attaching to his conviction remained. Much was said concerning the authority of Sir George Mackenzie, an old writer on Criminal Law, but the Judges were not disposed to worship at his shrine. Indeed, they said he was inaccurate. Lord Eskgrove, indeed would have upheld the objection, but he said this was an English pardon for an English offence, and the law of England had made the witness competent by the grant of the pardon. So Brown was allowed to give evidence, but not until Braxfield had solemnly warned him of the consequences of perjury. He was closely, but not unfairly, cross-examined and got very heated. He went so far as to protest at being teased by impertinent questions, for which he was severely reprimanded by the Court. Mr. Clerk fastened on the making of the key, and on receiving an answer objected that it was no answer to the question. Braxfield observing that it was enough to satisfy any sensible man, Clerk retorted that it was for the



jury to judge that. After this, Smith's and Brodie's statements were read, and the letters Brodie sent and various papers found in his possession. The prosecution had produced evidence which established the prisoners' guilt, unless a vast amount of deliberate prejury had been committed, but the case really rested on Ainslie and Brown and the documents.

Then came Brodie's witnesses, introduced by the remark that they were called to prove an alibi. The first was his brother-in-law, and the Lord Advocate objected. The objection to such a relative was so unsubstantial that no formal ruling was given. He merely proved that he was with Brodie until just before eight. Then came Jean Watt. It had been rumoured that Brodie had married her in prison, and if true the fact would have disqualified her. Accordingly the Lord Advocate asked her if she were married. She denied it and was allowed to give evidence. She said Brodie came to her a little after eight and stayed all night. The maid also said it was eight. She told the time by the bell of the Tron Church, a manifest impossibility; but when asked, where it was, she said it stood in Parliament Close, a quarter of a mile from its actual site. Other witnesses proved that he left Jean Watt's house the next morning. Then came a witness for proving the information for cheating at dice, to enable counsel to suggest that that suit had induced Brodie to flee; and a final witness proved that the implements found at Brodie's house were usual implements kept by a wright. By this time it was one in the morning, and the Lord Advocate began his speech. It was an adequate summing-up of his case.

At its close, Clerk rose. He had refreshed himself with a bottle of claret. He was a cross-grained young man defending a hopeless case but determined at least to make a name. At such an hour, and with such a Court and Counsel, scenes were only to be expected. His rotund opening was interrupted by a request that he would be short and concise, and he proceeded to state what in his view were the main points against his client, and the answers to them. For a time he went on without interruption, but when he came to deal with the evidence of Ainslie and Brown uproar began. He mentioned the objections made and overruled, but expressed his adherence to the objections. "Gentlemen," he said, "I think a great deal of most improper evidence has been received in this case for the Crown." The Judges admonished him, and he continued: "I beg to assail at the outset the evidence of these two corbies, or infernal scoundrels." "Take care, sir, what you say," growled Braxfield. Clerk went on. As he was saying that Brown ought not to be received as a witness in any case, the bystanders broke out into applause. Braxfield reminded him that the Court had ruled. Clerk replied, "But your Lordship should not have admitted him, and of that the jury will now judge." At this the Judges protested that he was attacking them, but he answered: "I am attacking the villain of a witness, who, I tell your Lordship, is not worth his weight in hem." At this stage the Dean of Faculty tried to soothe the angry man, but Clerk was not to be held in. Braxfield reminded him that the jury were to take the law from the Judges. "That's a deny," retorted Clerk, and amid interruptions he continued. The Lord Advocate referred to the pardon, but Clerk replied: "Can His Majesty make a tainted scoundrel an honest man?" and the bystanders again applauded. The Lord Advocate said to Clerk that the prerogative of mercy was "the brightest jewel in His Majesty's Crown," which gave the latter the opening for the pointed and discourteous retort: "I hope His Majesty's Crown will never be contaminated by any villain round

He again repeated that the jury were Judges of the law, and on being reproved declined to continue. He was ordered to go on, and repeated the obnoxious remark. Again the Judges warned him and he sat down. Braxfield asked if he had done, and he replied "No" but refused to go on unless he could speak in his own way. The Court then called on Erskine, but the Dean of Faculty shook his head. Braxfield then turned to charge the jury, but before he could say a word Clerk leapt to his feet. Shaking his fist at the Bench, he shouted, "Hang my client if you dare, my Lord, without hearing me in his defence." Consternation reigned in the Court. The Judges rose and departed to consider what they should do. Eventually they returned and merely requested Clerk to continue. This time he did finish, mainly because he had exhausted his provocative material. It was an able argument, though impossible of success. What he did achieve was the making of reputation.

This storm preceded the Dean of Faculty's eloquent but temperate plea for Brodie. He also attacked the accomplices, but on the safer ground that, though their evidence was admissible, it could not be believed. "Is it possible," he asked, "that a King's pardon can restore purity of heart, rectitude and integrity? Can a piece of parchment with a seal dangling at it..... turn wickedness into honour? The King has no such prerogative. This is the prerogative of the King of Kings alone, exerted only towards repentant sinners." But his main theme was the alibi. If his evidence was accepted, Brodie could not have been present at the crime. At half past four Braxfield commenced the summing-up. The only question was, who committed the offence—for that the offence was committed was not in dispute. It was short and to the point. The alibi turned on the ringing of a bell, but a bell rang at ten as well as at eight. He had directed attention to the corroboration of Ainslie and Brown, and ended by expressing his opinion that both prisoners were guilty. If they agreed, then they would convict both. He mentioned a possibility that they might acquit Brodie, but never allowed that Smith might go free. It was six o'clock when he had done and the jury retired. The Court then adjourned until 1 p. m. When it again met, the Jury were ready with their verdict, which was delivered in a writing sealed with black wax. The Chancellor of the jury handed it to the Court. In deep silence it was read by the Judges, who then ordered it to be read aloud. In formal language they pronounced both Brodie and Smith to be guilty. *See Famous Trials of History by First Earl of Birkenhead.*

## CHAPTER 73

### In Case of Warranty of Horse

Where the defendant represented a horse advertised to be sold as sound and the plaintiff wrote to the defendant that he would take the horse if the defendant would produce the veterinary surgeon's certificate, held that the asking of a veterinary surgeon's certificate did not operate as a waiver of the defendant's as to the soundness of the animal. 9 A. L. J. 285; 14 I. C. 135.

In case of warranty by the seller the measure of damages is not the full consideration which has passed from the buyer. Any benefits received by him under the contract must be taken into consideration and the damage recoverable will be the excess only of the value of the one over the other, the measure of damages is a difference between the actual value and its value if the property had been what it was represented to be. 1939 O. 186, (1920) 3 K. B. 475.

Plaintiff sought to recover damages for breach of warranty—the defendant had sold him horse with an express warranty that he was sound, of kind, and free from all doubts. The next day the plaintiff noticed that the shoe was loose and he undertook to drive him to blacksmith's shop to have him shod, where the horse exhibited such violent reluctance that he was obliged to abandon the attempt. Repeated attempts to shoe him failed and he was compelled to sell it.

The defendant called two witnesses, the first, an honest, clean looking man, testified that he was a blacksmith, that he knew the horse in question perfectly well and he had shod him about the time referred to in plaintiff's testimony.

Q. "Did you have any difficulty in shoeing him?" asked the defendant's counsel. A. "Not the least. He stood perfectly quiet. Never but a horse stood quieter."

The other witness testified that he had owned the horse and that it was perfectly kind.

Q. "Did you have any trouble about getting him into a blacksmith shop?" A. "Well, Sir, I don't remember, that I ever had occasion to carry him to a blacksmith's shop while I owned him."

The plaintiff's counsel evidently thought that cross examination would only develop this unpleasant testimony strongly so he let the witnesses go. The Jury found for the defendant.

The next morning, the writer met the blacksmith, who said, "You heard that horse case tried yesterday? Well, the plaintiff's counsel did not know how to cross-examine worth a cent. I told him that the horse stood perfectly quiet, while I shod him and so he did. I did not tell him, I had to hold him by the nose, with a pair of pincers to make him stand. The old man said he never took him to blacksmith's shop, while he had him. No more he did. He had to take him out into a open lot and cast him before he could shoe him." See 10 American Law Review, 153.

## CHAPTER 74

### In Will Cases

In probate and letters of administration cases, the chief difficulty is that the testator is dead and the witnesses generally interested. Hence the Courts have held that strict proof is required in the case of oral will. 1939 A. 348, 137 P. C. 174. Strict proof is required in case of oral will. 1939 A. 348, 137 P. C. 174. Surrounding circumstances should be considered. 1932 P. C. 101. Propounder must prove sound disposing state of mind. 1939 M. W. N. 651. Omission to call writer as witness and to examine him is immaterial so long as other witnesses have been examined. 1938 C. 290. Onus is on the propounder to show that it is the last will of a free capable testator. 1933 A. 201; 174 I. C. 882. Mere suspicion cannot render a will improbable. 40 P. L. R. 4. Parol evidence of a written will that is lost or suppressed is admissible in evidence. 1939 S. 86; 181 I. C. 255. Onus of proving execution of will is propounder. 1939 C. 674. If unregistered will is propounded after 20 years, the onus is very heavy on the propounder. 1939 C. 535; 183 I. C. 758. Registration is not proof of testamentary capacity. 1940 M. 315. The fact that only one out of six attestators was examined intensifies suspicion. 1940 M. 315. Whole of the will must be looked at. Case law is only guide for application, as no two wills are the same. 1940 Q. 275.

**Sound and Disposing Mind of the Testator.**—The chief question in the case of will is that a person should have a sound and disposing mind. Unless this is established, no Court will grant probate. See S. 59, Succession Act. But as to what is sound and disposing mind, the following decisions will be of great help:—

Mere ability to sign one's name or mere consciousness of the fact that the testator was able to maintain ordinary conversation and to answer familiar and easy questions is not enough to constitute a sound and disposing mind. 47 C. 1243, 19 C. W. N. 826. The testator must be capable of disposing of his property with understanding and reason. 15 C. W. N. 728. If a testator gives instructions for a will and it is prepared in accordance with those instructions, a very slight mental capacity for execution of the will would be sufficient. 7 Bom. L. R. 92, 5 Bom. L. R. 627, 39 C. 245 (256), 13 C. W. N. 1128. The testator must be able to appreciate his property and to form a judgement with respect to the parties whom he chooses to benefit by it. 24 C. W. N. 860. Mental weakness to constitute testamentary incapacity must be *qua* the will itself. 1933 C. 574. Execution of a will by a competent testator raises the presumption that he knew and approved the contents of the will. 21 C. 279. Where will is produced which on the face of it is validly executed, the Court will presume that the testator was sane. 34 Bom. L. R. 1371. If any party alleges that the testator was infant, then the onus will be on the party propounding the will to prove that the testator was of sound mind at the date of the execution of will. 7 Bom. L. R. 175. The burden always lies first on the party propounding the will to prove that the testator was of sound and disposing mind. 27 C. W. N. 797, 29 C. W. N. 45, 15 C. W. N. 728, 41 C. L. J. 300. If the age of the testator is challenged, the onus of proving that the testator was not a minor lies on the person propounding the will. 5 L. 263, 38 M. 166. It is not necessary that the testator should have been in perfect good health and that his mind should have been so clear as to enable him to give complicated instructions for his will. It is sufficient that he was capable of understanding the will. 23 Bom. L. R. 1063. If the insanity of the testator before the date of the will is established, the onus that it was made during a lucid interval lies on the person propounding the will. 34 Bom. L. R. 1371. Proof of consciousness alone is not enough. 22 M. 345. When a will is natural one and in accord with the feelings of the testator and its execution is satisfactorily proved, the presumption is in favour of its being genuine. 18 C. W. N. 521 (P. C.), 22 C. 519, 20 C. W. N. 617. Where the capacity of the testator is proved to be doubtful or where the testator is proved to be blind or illiterate, there must be satisfactory evidence of instructions or of reading over and approval of the contents of the will. 21 C. 279, 25 C. 824 (P. C.). If the evidence is conflicting, the appellate Court should have regard for the opinion of the trial Judge. 36 I. A. 185. If the testator is an old man, mere old age will not deprive him of the capacity of making a will. But if he becomes a very child again in his understanding or by reason of extreme old age and other infirmities, he becomes so forgetful that he does not know his own name, he is not fit to make a will. The real test is whether the testator had a proper appreciation or comprehension of his act. 23 C. I. 3 Moor. P. C. 282, 22 B. 17 (P. C.). The general assertion that the wife was of commanding character and that the husband was weak is not enough to establish undue influence. 22 B. 17 (P. C.). The will of a man suffering from epileptic fits is bad. 32 Bom. L. R. 1289. The will of a person suffering from paralysis

was held to be good 1 L. 173. The testamentary capacity is not displaced by mere proof of serious illness and general intemperance. 38 C. 355 (P. C.) Where instructions for the will had been given before serious illness and the will is executed during serious illness, the onus on the person propounding the will is light. 50 C. 100. According to Muhammadan Law if a will made after taking poison, it is bad, but not if it is made before. 21 A. 3. (P. C.)

**Revocation of Will.**—If the direct evidence shows or circumstances are established that the will had been revoked, or that the will in question is not the last will of the testator, no probate will be granted. See Ss. 62 and 63 of Succession Act.

The Succession Act has not adopted the principle that the will shall be deemed to be revoked in consequence of the change in circumstances of the testator, or by his change of domicile, or a change with respect to his rights to the property he disposes of. 30 M. 360. Last testament shall be operative to the exclusion of previous contrary or inconsistent one. But the intention to revoke a former will must be clear. 19 C. 444 (P. C.) If the two wills are not consistent they cannot be considered as two separate wills but the two together must be considered to indicate the testamentary intention of the deceased. 33 Bom. L. R. 1056. If there are two inconsistent wills both of the same date or undated, both are void for uncertainty but in such cases, it is the duty of the Court to reconcile them if possible. 15 C. 409 (P. C.) A will is not to be treated as revoked either wholly or in part by a will which is not forthcoming unless it is proved by satisfactory evidence that the will contained a recovery clause. 19 I. A. 83. An unprivileged will can be revoked by some writing declaring an intention to revoke and execute in the manner in which an unprivileged will is required to be executed, i. e., signed by testator and attested by two witnesses. 52 B. 653. Tearing off a will with intent to revoke is sufficient. 33 C. L. J. 314. If the act of destruction is inchoate and incomplete, it will not amount to revocation. 29 I. A. 156. Evidence is not admissible to prove that the testator has said that he had torn up the will. 29 A. 82. Actual destruction or formal revocation in writing was not necessary under the Hindu Wills Act. 7 C. W. N. 1. Where the testator draws two cross lines on the first page and on the top of page writes "this will is cancelled" and puts his signatures. Held, that the rest of the will was not cancelled. 52 B. 653. Where will is written on several sheets of paper and each sheet is signed and attested, tearing off the last signatures will revoke the whole will. 3 C. W. N. 617. Where will was duly executed and was in testator's possession but is not forthcoming on his death, the presumption is that it would have been destroyed by himself. 31 C. 835, 45 B. 906, 19 C. W. N. 929 (P. C.), 18 C. W. N. 527. If one portion of the will is lost, probate can be granted of the portion to the extent to which the contents are proved. 26 C. 634. To establish revocation destruction by the testator must be proved. Mere loss of the will does not operate as revocation. 18 C. W. N. 527. When a testator destroys his will or codicil with the intention of setting up a previous will or codicil executed by him, the *animus revocandi* or the intention to revoke is a conditional one, the condition being the validity of the document intended to be set up. If therefore, the document intended to be set up is not a legal one, e. g., if it is not validly executed, the subsequent will is not revoked. This is generally known as the doctrine of dependent relative revocation. 39 M. 107 (P. C.) If a testator executes a will on several sheets of paper and afterwards takes out one sheet and substitutes another in its place which is not signed and attested, the doctrine of the dependent relative re-

vocation will not apply, and probate will be refused of the whole will. 20 B. 370, 49 C. L. J. 321. A will of a Hindu, Jain, Sikh, etc., must be revoked in the manner laid down by S. 70, Succession Act, i. e., (i) by another will or codicil, or (ii) by some writing, or (iii) by burning, tearing, or otherwise destroying the will. These modes are exhaustive. 30 M. 369, 25 M. 678 (P. C.). A will of a *Cutchi Memon* can be revoked by any definite expression of a present intention to revoke it. But a mere expression of an intention to revoke a will at some future date does not amount to revocation. 1938 M. 616. No particular formality is necessary for showing an intention to revoke a will. Inference can be drawn from conduct. 71 M. L. J. 845. Property was dedicated to *waqf* by will. Testator subsequently gifted the property but *waqf* property was not included in the gift. Held, that deed of gift did not cancel the will. 1936 L. 81. A mere expression of intention to revoke at some future date will not amount to revocation. 1938 M. 618. If a registered will is not found after the death of testator, no inference of revocation can be drawn. 44 Mys. H. C. R. 57, *contra* 1940 A. 175. In the absence of substantial defects in proceedings, revocation can be granted only when will is proved to be forgery. 1940 C. 296.

**Attestation of a Will.**—The law requires a will to be attested by two witnesses, who saw the testator put his signatures on it. S. 63 of the Indian Succession Act, 1925, provides that a will governed by Indian Succession Act, must be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence and by the direction of the testator or has received from the testator a personal acknowledgment of his signatures or mark or of signature of such other person; and each of the witnesses must sign the will in the presence of the testator; but it is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. See S. 63 (c), Indian Succession Act.

The attestation must be after the testator has signed the will and not before. 5 C. 738. The attestation must be by the signature of witnesses or by the mark. 58 A. 1064, 39 Bom. L. R. 626. The initials of attesting witness are sufficient. 15 M. 261. It is sufficient acknowledgment by a testator of a signature to his will if he makes the attesting witness understand that the paper which they attest is his will though they do not see him sign it. 1 B. 547, 4 C. W. N. 204. A will can be proved by one of the attesting witnesses. 22 C. W. N. 315. Attestation does not estop a person from denying anything except that he has witnessed execution. 24 Bom. L. R. 557 (P. C.). Knowledge of contents ought not to be inferred from the fact of attestation. 24 Bom. L. R. 557 (P. C.). The mere fact that attesting witnesses have repudiated their signatures does not invalidate the will if it can be proved by reliable evidence. 20 C. W. N. 192. It is not necessary that each attesting witness should prove the same fact. One witness may depose to the signatures and the other may depose to the acknowledgment. 19 C. W. N. 1295. No particular form of attestation is necessary. I. C. 150. Where the testator deposits the will under S. 42, Registration Act, and the Registrar endorses the cover in the manner required by S. 43, Registration Act, the Registrar is not an attesting witness within the meaning of S. 63, Succession Act. 8 P. 419. A testator was roused from unconsciousness in order to sign the will and attestation took place. There is sufficient compliance. 42 C. W. N. 649. A scribe may be attesting witness but it must be shown that he signed it as such. 1939 C. 595. If attesting witnesses deny valid attestation, Court can discard their evidence if suspicious and pronounce in favour of will. 1939 O. 213. A will contained a clause "I have executed this will with the consent

of all my sons and have got them to sign it as witnesses, so that the will may be acted upon fully and they may not quarrel after my death." The sons signed the will. Held, that they were not attesting witnesses and the bequest in their favour was not void. 106 I. C. 534, 32 C. W. N. 305 : 54 M. L. J. 43 (P. C.). A executes a will which is attested by B, C and D. A legacy of Rs. 1,000 is given to D. D cannot take the legacy, though without him there was the full number of witnesses. 4 M. 244. A, a Hindu, executes a will containing a clause for the benefit of the solicitor who prepared and attested the will. Does the solicitor lose the benefit? No. S. 67 of the Succession Act does not apply to Hindus. Accordingly an attesting witness of the will of a Hindu governed by the Hindu Wills Act does not lose any legacy thereby bequeathed to him. 29 B. 530. A bequeaths his property to his wife for life and after her to his three children X, Y and Z or the survivor equally and there was a residuary clause in favour of the wife. X attested the will. After the widow's death Y filed a suit that X was incapable of taking and that the property be divided between Y and Z. Held, share of X lapsed but it fell into the residue and did not accrue to Y and Z. 26 M. 433.

**Alterations or Obliterations or Ambiguities in Will**—Court can throw out a will on the ground of the material alterations or obliterations. See Ss. 71—80 and 81, Succession Act.

The alterations, inter-leniations or obliterations will be given effect to if the signature of the testator and of the attesting witnesses is made in the margin or on some part of the will opposite or near to such alterations, or if memorandum is signed by the testator and by the attesting witnesses at the end or some other part of the will referring to such alteration. If these requisites are not complied with, probate will be issued omitting the alterations. 1 C. W. N. 428. Marginal notes which are not signed and attested will not form part of the will. 15 Bom. L. R. 352. S. 75 applies to alterations or obliterations made after the execution of the will and not before. 29 C. 311. If a will contains alterations or erasures they will be deemed to have been made after the execution of the will, and the onus will be upon the person who seeks to rely that the alteration was made before the will was executed. If there is no evidence to rebut the presumption they will not form part of the will. 29 C. 311. Where the testator made alterations in the will with the pencil after its execution, and thereafter executed a codicil confirming the will as altered, probate will be granted of the altered will. 29 C. 311. A made a will on four sheets of paper and afterwards removed the second page and substituted a new page which contained a bequest to a person not born at the date of the will. Probate of the substituted page was not granted. 20 B. 370. Oral evidence is admissible to show circumstances, habits, and state of the testator's family. 39 Bom. L. R. 1151. Extrinsic evidence as to whether the word "Maharani Sahiba" applied to senior Rani or junior Rani, was not allowed and it was held that the words only applied to senior Rani. 15 C. 725 (P. C.). Words will not be added to give effect to what may be fancied to have been the intention of the testator. 5 Bom. L. R. 729. Where there is an imputation of fraud in making the will, extrinsic evidence is admissible. 3 Bom. L. R. 465. A testator by his will directed his executor out of Rs. 500 to disburse petty pensioners to such poor "who have been mentioned to him (the executor) by me." Held, there was a deficiency on the face of the will as to the objects of benefit and no extrinsic evidence was admissible and the legacy failed. 15 M. 448.

#### Illustrations

- (i) If an attesting witness to a will should testify he saw the testator



sign his name, and should then be asked if he was sure he saw the testator make the very letters, which form his name would not the usual answer be, 'I saw him write letters on the will, and then attested it.' This was Dr. Lushington's opinion. 'Lastly' said that eminent Judge, put this question—'Were you not at the foot of the bed when the testator signed, and will you swear that, as the letters of the name would necessarily be backward to you as you stood, you are sure you saw the letters of the name formed?' Where is the honest witness who would dare to give positive affirmative answer to that question; especially too, after the lapse, as in the present case, of more than two years? It would be ridiculous in the Court to expect it; more especially, too, as it very seldom happens that witnesses follow the precise movement of a pen in the hand of a writer. 2 Rob Ecc., pp. 426, 435.

(ii) Theophilus Harrington, a Vermont Judge in the early part of the last century, was a man who loved the right and cared little for mere legal quibbling. "If justice controls your verdict," he would often say to the jury, "You will not miss the general principles of the laws." At one trial, when the possession of a farm was in question, the defendant offered a deed of premises, to which the plaintiff's lawyer Daniel Chipman objected because it had no seal.

"But your client sold the land, was paid for it, and signed the deed, did he not?" asked the Judge.

"That makes no difference," said Chipman, "the deed has no seal, and cannot be admitted in evidence."

"Is anything else the matter with the deed?" asked the Judge.

"I do not know that there is."

"Mr. clerk," said the Judge, "give me a wafer and a three cornered piece of paper."

The clerk obeyed, and Judge deliberately made and affixed the seal.

"There, brother Chipman," said he, "the deed is all right now. It may be put in evidence. A man is not going to be cheated out of his farm, in this Court, when there is a whole box of wafers on the clerk's desk." 31 M. L. J. p. 14.

(iii) In a contested will case in Illinois the Supreme Court said:—  
 "These doctors were summoned by the contestants, as 'experts' for the purpose of invalidating a will deliberately made by a man quite as competent as either of them to do such an act. They were the contestants' witnesses, and so considered themselves. The testimony of such witnesses is worth but little and should always be received by Juries and Courts with great caution. It was said by the distinguished Judge, in a case before him, if there was any kind of testimony not only of no value, but even worse than that, it was in his judgment that of medical experts. They may be able to state the diagnosis of the disease more learnedly, but upon the question whether it had at a given time, reached such a stage that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinion of his neighbours, if men of good common sense, would be worth more than that of all the experts in the country. It must be apparent to every one, but few wills could stand the test of the fanciful theories of dogmatic witnesses who bring discredit on science and make the name of 'expert' a by-word and a reproach. We concur with the Judge above referred to,



we would not give up the testimony of these common-sense witnesses deposing to what they knew and saw almost every day for years, for that of so-called experts, who always have some favourite theory to support—more often as presumptuous as they are ignorant of the principles of medical science.” 77 Ill. 397, 13 (N. Y.) Supp. 255, 260.

“There is something repugnant in the way which ordinary physicians have no tossing off opinions regarding the mental state of a fellowman. With only the slimmest opportunity for observation or experience these medical gentlemen remand their patient to the realm of the insane, or pronounce him lacking in capacity to make a will.” 19 Misc (N. Y.) 333, 44 (N. Y.), Supp. 353 (at p. 356).

“The expert witness may be corrupt and yet beyond the reach of punishment.” 21 Barb. (N. Y.), 331, 332.

(iv) This was a case where the validity of a will was in dispute.

On the one side the testator was alleged to have been perfectly capable, on the other as decidedly incapable, of understanding what he was doing. One witness in the most straightforward manner, declared it to be his opinion that the testator was of sound mind, memory and understanding.

Q. “I believe you were related to the testator, were you not?”  
A. “I was.”

Q. “Nearly related?” A. “Yes.”

Q. “And would you have an interest in the will, if established?”

No objection seems to have been taken to this question, which is very like giving evidence as to the contents of a document which was not yet read. A. “Yes.”

Q. “Would you take as much as ten thousand pounds if the will were established?” A. “I should,” said the witness.

If matters could have remained here all would have been well; but the counsel on the other side asked in re-examination:—

Q. “Have you made a calculation as to what you would be entitled to in the event of an intestacy?” A. “I have.”

Q. “What would it be?” A. “As next of kin I should be entitled to fifty thousand pounds.”

(v) Warren, the distinguished lawyer and author, once produced a great sensation in Court by his examination and exposure of a false witness. The witness having been sworn, he was asked if he had seen the testator sign the will, to which he promptly answered he had.

Q. “And did you give it at his request, as subscribing witness?”

A. “I did.”

Q. “Where was the testator when he signed and sealed this will?”

A. “In his bed.” Q. “Pray how long a piece of wax did he use?”

A. “About three or four inches long.”

Q. “Who gave the testator this piece of wax?” A. “I did.”

Q. “Where did you get it?”

A. “From the drawer of his desk.”

Q. “How did he light the piece of wax?” A. “With a candle.”

Q. "Where did the piece of candle come from?"

A. "I got it out of cupboard in his room."

Q. "How long was that piece of candle?"

A. "Perhaps four to five inches long."

Q. "Who lit that piece of candle?" A. "I lit it."

Q. "What with?" A. "With a match."

Q. "Where did you get that match?"

A. "On the mantel-shelf in the room."

Here Warren paused, and fixing his eyes on the prisoner, he held the will above his head, his thumb still resting upon the seal, and said, in a solemn and measured tone. "Now, Sir, upon your solemn oath, you saw the testator sign that will; he signed it in bed; at his request you signed it as subscribing witness; you saw him seal it; it was with red wax he sealed—a piece two, three or four inches long; he lit that wax with a piece of candle which you procured for him from a cupboard; you lit that candle by a match you found on the mantel-shelf?" A. "I did."

Q. "Once more, Sir, upon your solemn oath, you did?" A. "I did."

Counsel, addressing the Judge: "Your Honour, it is a wafer." 16 M. L. J. (Jour.), pp. 258-259.

The result of the case as affected by the testimony of this witness is obvious.

(vi) In answer to the long-hypothetical question of the attorney who called him a doctor, one Mr. Thompson gave it as his opinion that the testator was afflicted with "Senile dementia."

Across the room sat a young attorney on the opposite side with a formidable battery of medical books close to hand. It was his duty to cross-examine the expert and to show his opinion was at variance with the books.

In varying forms the same questions were asked and re-asked at wearisome length. Dr. Thompson stood the ordeal without complaint until nearly midnight. Then the following question was put:

Q. "Doctor, you have given it as your judgment that the testator was suffering from what you are pleased to term 'senile dementia.' Now, I wish you would repeat to this jury some of the evidences of 'senile dementia' in a patient." A. "Well, the books say, when a man has 'senile dementia,' one of the symptoms is to ask the same question over and over again after it has been clearly answered."

No doubt it might not have been proper for the counsel to repeat the same question over and over again. But is the function of the Court to see whether such repetition is allowed or not. It was no business of the witness to make such an answer as the above. 25 M. L. J. p. 81.

(vii) Sometimes witnesses speak words which they think are true to the letter, but which certainly is not true in fact or in spirit. The following is a method that may well be adopted in the cross-examination of such a witness:—

In this case Sir Charles Mathews appeared as prosecuting counsel against a solicitor charged with having forged the will of a dead lady.

For the defence, a woman swore that she had seen the lady, who was ill in bed at the time, sign the will. She added that the solicitor handed the deceased lady the ink and the pen with which to sign.

"Did he touch her hand?" demanded Sir Charles.

"I think he did just touch her hand," the witness replied.

"When he did touch her hand," proceeded Sir Charles, and in an instant his voice rose and became harsh and terrible, "Was she dead?" Turning deadly pale the witness seemed to struggle for breath, swayed in the box, and fainted. The solicitor had taken the hand of the deceased woman and with it had written her name to the forged will. 27 M L 130.

(viii) Earl Rodger of California had marked ability to cross-examine witnesses. At one time he appeared on behalf of a group of persons who had contested a will. They claimed that the testator was not in the full possession of his senses at the time of the execution of the will. In other words he had no disposing mind. The chief witness for the propounders of the will was a lifelong friend of the testator. In his examination in chief he gave a straightforward story of how he had signed the will as a witness and deposed that the testator appeared to him to be quite intelligent and in possession of full faculties. Earl Rodger rose to cross-examine him. The audience sensed some dramatic developments but after a few minutes they felt disappointed and lost all interest. The cross-examiner began to cross-examine the witness in detail about seemingly immaterial evidence which occurred several days previous to the execution of the will. He tried to show that the witness was a man of intelligence and had a perfect memory of all things he had done on the day when the will was executed. So much so that he even remembered the immaterial details as to what his breakfast had been that day. He stressed the point that the witness was a close friend of the deceased. The important portion of the cross-examination is given below.

Q. Was there any change in your friendship before Patrick Talent the testator died? A. None whatsoever.

Q. At any time in the past, had there been any misunderstanding between you? A. Never, we were always warm friends.

Q. And when you signed the will as a witness of your old friend's signature, what did you do then? A. I left.

Q. Did you bid Patrick Talent goodbye, before you took your departure? A. No I left as soon as I had witnessed his signature.

Q. What you mean to tell this Court and hurry that you, the deceased friend, the life long friend of Patrick Talent, knowing he was dying, did not bid him a last goodbye? A. I don't think I did.

Q. You don't think? If you bade farewell to your lifelong friend on his deathbed you would not be uncertain about it. You would know. Did you bid him goodbye? A. No.

Q. If you did not say goodbye to your dying friend, there could be only one reason and that was that you knew he was mentally incapacitated that he did not know you?

There was no answer to this question.

(ix) The testator died leaving behind a large estate, without making any will. One of the heirs planned a clever ruse. He bribed a gentleman of outstanding reputation and got the will attested by him. The hand of

the dead man was fixed to the pen and with their help the deadman signed his name. The heir took hold of a living fly and put it in the mouth of the deceased. After the execution of the will, the fly was let go. The witness entered the witness stand and solemnly swore that the deceased had signed the will with his own hand. He was cross-examined thus :—

Q. Was he, then a live or dead ?

A. There was life in him (Meaning thereby that a living fly was in him). Thus he tried to save his conscience by saying that there was life in him. Literally it was true, though the spirit had departed much earlier.

## CHAPTER 75

### Of Accomplice

An accomplice is a guilty associate in crime. *See Wharton's Law Lexicon*, P. 19. 27 M. 271.

Section 133, Evidence Act, provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Section 114, Illustration (b), of the Evidence Act, provides that a Court may presume that the evidence of accomplice is unworthy of credit unless corroborated. *See* 1929 C. 822. In criminal trials evidence of accomplice is generally not accepted without corroboration. 1927 L. 581, 1945 N. 1, 1936 P. C. 242

Section 337, Criminal Procedure Code, provides that a pardon can be given to an accused person who makes a clean breast of the whole case. After the pardon he turns King's evidence and becomes approver. Cross-examination of an approver is very important because he paints himself black with the same brush as his associates in the crime. It has been held in a number of cases that an approver is a man of the worst character who wants to save his skin by throwing his associates and friends to wolves. His evidence must be received with great caution. He can easily substitute an innocent person for the real offender. *See* 1931 L. 408. Association with the criminals must be considered. Goethe has well remarked: "Tell me with whom thou art found and I will tell thee who thou art." Frequent intercourse and intimate connection between two persons makes them so alike, that not only their dispositions are moulded like each other, but their very faces and tones of voices contract a similarity. When we live habitually with the wicked, we become necessarily their victims or their disciples. Evil companions are the devil's agents.

**Who is an Accomplice.**—The following decisions will show as to who is an accomplice :—

Witnesses who had witnessed the crime and assisted in concealing evidence or connived at and gave no information to police or any other person are no better than accomplices. 1929 L. 540: 120 I. C. 190: 31 Cr. L. J. 50. Where a woman willingly accompanied her lover to a hut where he went in and murdered her husband and she returned to the village and gave no information to any one till next morning, held she is accomplice of the murderer. 6 L. 183: 1925 L. 432: 88 I. C. 854: 26 Cr. L. J. 1238. A person offering bribe to a police officer is an accomplice. 14 B. 331, 14 B. 115, 26 B. 193, 9 P. R. 1917, 114 I. C. 457: 1929 N. 215, 26 M. 1, 27 M. 271. Persons present at bribe giving transaction are not accomplices, if they did not take any part. 26 M. 1, 33 C. 649, 50 I. C. 1918, 27 C. 144. Persons supplying marked

money for detection of crime are not accomplices but only detectives or spies. 1936 N. 245, 19 B. 363, 27 M. 271, 38 C. 96, 15 B. 661, 35 B. 401, 44 A. 226, 13 L. 366, 52 C. 721, 28 C. 709, 33 C. 1353, 135 P. L. R. 1904, 131 P. L. R. 19 : Persons bribing for obtaining release of wrongfully confined persons are not accomplices, specially when money was not given voluntarily. 27 C. 925.

A person helping accused in disposing of dead body after murder is not accomplice. 1923 L. 345 : 73 I. C. 506 : 24 Cr. L. J. 618. A person who has knowledge of the commission of the offence but keeps quiet for some days is no better than accomplice. 96 I. C. 867 : 33 C. W. N. 816 : 27 Cr. L. J. 1011 : 21 C. 328, 24 W. R. (Cr.) 55. Where a witness is found, from his own testimony, to be privy to the crime, his evidence is no better than that of an accomplice. 1925 L. 253 : A person who is aware of the intention of certain people to commit murder and does not disclose it to anybody is a consenting party to the crime and an accomplice. 20 Cr. L. J. 191 : A person who by threats of death is induced to do an act in order to facilitate the commission of murder cannot be protected by S 94, I. P. C., and is an accomplice. 14 C. L. J. 207 : After the murder was committed, one of the inmates of the house removed the blood stains on the ground under compulsion and threat of murder. Held, she was not accomplice. 33 P. L. R. 269. Where a person came to know of the conspiracy to murder another but never told the latter and it was shown that he agreed to the proposal of the conspirators himself being actuated by sordid motives, held, he was an accomplice. 1932 Oudh L. 33 Cr. L. J. 287 : 43. A person knowingly aiding in disposal of stolen property is accomplice. 1934 M. 721. A person who is convicted and sentenced continues to be accomplice and his evidence from the witness-box is governed by the same principle. 1933 B. 21 : 34 Cr. L. J. 136. If a person has knowledge that crime is to be committed he is not accomplice, unless he participates in the crime. 1936 C. 101 : 37 Cr. L. J. 445. A person who sees a murder committed but gives no information of the fact is no better than accomplice. 1923 L. 391 : 25 Cr. L. J. 251, cont. 1931 Oudh 315, 1935 Oudh L. His evidence requires careful consideration. 1933 C. 573. If a woman cognizant of the intention of her Paramour to kill her husband and does not disclose it to her husband, she is no better than an accomplice. 1936 L. 731 : If at the time when a witness joined the conspiracy he had no intention of bringing associates to book but his object was to participate in the commission of crime, he is not an informer but an accomplice, although he later on carried information to police. But if his sole object was detection of crime, he is an informer. 1928 L. 647, 1928 L. 193 : A person was present when plans for dacoity were hatched and agreed to go to the place of meeting, armed with revolver but remained at home for six hours and did not inform anybody. He then went to the spot and was sent to fetch food for offenders, when he disclosed the whole affairs. Held he was accomplice. 9 L. 550 : 1928 L. 193 : Where certain persons associated with the accused without any criminal intention with the sole object of entrapping the accused in order to detect an offence, held, that they were mere spies or detectives. 1931 Oudh 172 : 132 I. C. 234 : 32 Cr. L. J. 860, 33 C. 96, 9 L. 550 : 1928 L. 193, 1928 L. 647, 13 B. 363. The rule requiring corroboration does not apply to informers. 33 C. 96. 1931 Oudh 172, but see 19 B. 363, 1929 L. 436 and 1925 Oudh 158 for other cases see Prem's Criminal Practice 1947 (4th Ed.).

**Value of Evidence of Accomplice**—Accused sent up for trial as accomplice, cannot be examined as witness. 12 P. R. 1902 Cr., 21 P. R. 1904 Cr. A discharged accused is a competent witness. 16 B. 661. Evidence of accomplice is inadmissible against co-accused which is given as accused person. 38

## OF ACCOMPLICE

P. R. 1867 Cr., 12 P. R. 1002. Evidence of an accomplice requires corroboration. 1930 A. 29: 120 I. C. 257, 1930 A. 740, 1929 L. 850, 1921 P. 406, 1920 P. C. 15. Confession implicating co-accused requires corroboration if co-accused is to be convicted on it. 1930 Pat. 385: 123 I. C. 393; 31 Cr. L. J. 492. 38 C. 559, 15 B. 66, 38 B. 156, 1924 O. 65. S. 114, III. (h), provides that a Court may presume that the evidence of an accomplice is unworthy of credit unless corroborated. "May" is not "must" and no Court can make it "must." 1920 C. 822: 1929 Cr. C. 669. The evidence of an accomplice must be received with suspicion, although he allows himself to be convicted on it. 1928 C. 233. The rule of caution that an accomplice's testimony should be corroborated is now regarded of a rule of law. 1927 L. 581: 28 Cr. L. J. 625. Court should exercise judicial discretion in considering whether an accomplice is or not worthy of credit. 8 Pat. 235: 1928 Pat. 630. The evidence of an approver is open to grave suspicion. 52 I. C. 49. It is unsafe to act on the uncorroborated evidence of an accomplice even though he is a mere relative of the accused. 19 P. L. R. 1911. Provisions of S. 133 and S. 114 (b) amount to a direction to all Judges and Magistrates that a fact cannot be held proved within the meaning of S. 3 if the witness is unreliable. All accomplices are not unreliable. 14 Cr. L. J. 262. An approver is a man of the lowest character who wants to save his skin by throwing his friends and associates to wolves. His evidence must be received with caution. He can easily substitute an innocent person for the real offender. 1931 I. 408. Where in the case of conspiracy to commit an offence under U. P. Excise Act, the accomplice was first put on trial and later on examined against the principal accused, held, that his statement is not inadmissible in evidence. 1932 A. 73: 33 Cr. L. J. 373. Approver's statement is subject to suspicion but of great value in certain cases. 1935 A. 477. If there is any fear in the mind of approver that failure to establish the case for prosecution will result in his own prosecution, it is not likely to lead to truthful evidence being given. 1935 C. 473: 157 I. C. 840: 36 Cr. L. J. 1248. Wife was consenting party to her husband's murder. Her evidence is that of accomplice and requires corroboration. 1934 L. 171, 20 P. R. 1919 Rel. on. If approver was examined last of all and the Counsel was unable to question corroborative witnesses properly, the opinion of assessors loses much value. 1934 L. 171. If the approver is falsely implicating two persons and is adding accusation against others which he never made in his first statement, the effect of his testimony is weakened. 1933 A. 31: 55 A. 91. Accomplice is unworthy of credit, (a) because he is likely to swear falsely in order to shift the guilt from himself; (b) because, as participator in the crime, he is an immoral person; (c) because he gives his evidence under the promise of pardon or in expectation of implied pardon. This hope would lead him to favour the prosecution. 14 B. 115. Confession of an accomplice to Police, dying before trial, criminating himself and others is relevant under S. 32 (3). 1926 L. 54: 26 Cr. L. J. 1308.

**Of Accomplices in Case of Theft.**—A number of thefts are committed through the instrumentality of the servant of the house. He is allured into some pecuniary advantage or is bribed beforehand, and in return affords some facilities for ingress or egress of thieves to the house. Again, there are associates or accomplices among the thieves who lay some sort of trap to divert the attention of the victims of theft, while their companions perform the stealing operation unnoticed. Dr. Hans Gross, who is known as the "Father of Criminology" in his famous book *Criminal Investigation* gives a vivid account of how these accomplices help the real

thieves to take away rich booty.

"A common method used by the Indian Koravers, who mostly work on railways or at fairs and festivals, and nearly always two or three or more together, when a weary passenger or spectator is found closely watching his property so that it cannot be easily purloined, is to post themselves on different sides close to him and one of them, seizing a boy of their party, gives him a thumping making the boy cry so loudly as to divert the attention of the watchful spectator. Seizing the opportunity of this momentary inattention, one of the Koravers makes away with the bundle or other article of property nearest to him. If on redirecting his attention to his things, the spectator spies the thief he naturally runs in pursuit of him, leaving his other things inadvertantly behind, which in their turn are carried away by the remainder of the gang present at the spot. Should one of the by-standers, happening to observe the Koravers, run and attempt to seize him, the latter flings the bundle in his face, takes to his heels, and thus eludes pursuit. "The attitude of the watcher towards an intruder depends partly upon the circumstances in which the theft is committed and partly upon his discretion and presence of mind: above all he must have a practised eye, so as to be able to recognise at a glance the relative importance of individuals coming to interfere: neither the merry-making tradesman nor the student going home gaily singing will be judged worthy of any attention; it will be enough to make their presence known in some way or other: if he observes other people coming who at the time have no suspicion but who may become suspicious on seeing a light or hearing a noise as they are passing near the scene of crime, he will warn his companions by a pre-arranged signal (a whistle, smacking of the tongue, etc.), to interrupt their work for a moment, to make no noise, and to extinguish the light, till the danger is pressed: a second conventional signal will inform them of the moment when the coast is again clear. "When the person living in a house where a theft is going on comes back home in the nick of time, or when a neighbour or watchman comes along and yet the danger is not quite great enough to give the signal for a general and sudden stampede, not only must warning be given but also enough time must be gained to allow those working inside the house to hide, or even to slip away with the booty already collected. The watcher outside must for this purpose hinder intruders from advancing and at the same time make enough noise to drown that necessarily caused by his companions during their flight: he will himself accost the person who has come along or else will manage to be accosted by him; he will ask the way, or the name of hotel still open, or the time; he will request a light for his cigar, or will beg for help to get up pretending that he has fallen and hurt his foot; sometimes he will relate in a loud voice and with many details that he has a paralysed arm and has need of some one to help him on with his overcoat, remarking how chilly the night has suddenly become. Taking up another line he will draw the attention of the passer-by to something abnormal; he has heard a cry for help or groans, he has seen a glare in the sky, or the hooligans who infest the neighbourhood, he has even met a mad dog, but all this in a direction calculated to make the stranger look, or walk away from the spot where his companions are carrying on their work. If he has courage and finds a suitable piece of waste-land, he will play the drunkard, will give the passers-by the benefit of a lecture under three heads, will launch into politics and criticism, will quarrel with those who for amusement take up the argument, then he make it up with his adversaries and finish by offering them his friendship. And when this "rum cuss", for this is what he is in the eyes of passers-by, has

at length taken himself off, his companions have also disappeared—with the booty.

"The author remembers how, as a student, he was going home one night with some of his companions, when the party was accosted by an old man who on some pretext entered into conversation. He prophesied the approaching end of the world and proceeded to prove it from the prophet Jonah. After a long talk the parties separated in a friendly way. Meanwhile about 200 yards distant from where the conversation took place, the Freemason's lodge of the town was broken into, and not only all the working tools stolen, but also the new tiled roofing, much to the satisfaction of all the good Catholics of the place. The cleverest watcher is without doubt one sharp enough to induce others to accost him; he looks about on the ground and declares to the sympathetic person who questions him, that he has lost a coin, his watch, or some other article, and when the new comer helps in the search, relates to him, not only everything concerning that loss, but the whole history of his life into the bargain. Another lies stretched upon the ground groaning so lamentably that the passerby cannot help asking him the reason for his doing so; then amid continual cries of pain he tells how he is suffering from a broken leg, strangulated hernia or colic, until our compassionate soul goes off to find a doctor, who naturally fails to discover the invalid. One day the proprietor of a house where a theft was going on returned home unexpectedly; all at once the accomplice who was watching near the front door and who had not heard the return of the master of the house in time, the latter wearing rubbersole shoes, began to ring the bell like a madman. The master of the house asked our friend what he wanted and the latter replied that his wife had just been suddenly attacked with the pains of child-birth, that she was suffering terribly, and that he had come to fetch the midwife who lived there; he was answered that there was no midwife in that house, that there never had been one and that there never would be one, but our man refused to listen and continued to babble and bewail his fate, till the master of the house offered to conduct him to the dwelling of the nearest midwife; the offer was accepted with a thousand thanks and they both went off in haste to find her, and, when the master of the house got back home, bathed in perspiration, he was just in time to catch sight of the last of the thieves escaping from the house, loaded with much rich booty. "Above all the approach of the police must be hindered; but as it is not always easy to draw them into a conversation under some stupid pretext or ask some useless information from them, there is no other recourse for the watcher than to attract the attention of the police to his own strange behaviour. If possible, he will do so in a way which exposes himself to no danger, he will pretend some illness or make some important communication; if this experiment does not succeed or if the danger is very menacing, there is nothing else for him to do but to get himself arrested. Without doubt he will take care that this does not cost him too dear; he will therefore for preference pretend to be drunk, he will stumble about, sing, cry out, bang up against the policeman, in short, he will do everything he possibly can to get himself arrested; and to make this arrest as prolonged as possible, he will try not to walk, will lie down, protest his innocence, ask pardon, but he will take good care to do no more than is absolutely necessary, that is to say, he will not go so far as to assault the policeman, for this would only have the effect of aggravating the offence and increasing the punishment. When he gets far enough away from the scene of the theft, his behaviour will get sensibly



better, and when nearing the station house or the police Court his drunkenness will have so far disappeared that there will be no longer any reason for keeping him in custody, and if, on the way, his custodians have found him to be "a decent sort of chap" and see that they have not got hold of an old offender or suspected person, they may let him go with a severe warning cautioning him not to behave like that again. "If the pretended drunkenness does not succeed, either because the police take no notice of it or it will take up too much time, the watcher is obliged to have recourse to a misadventure which will bring about his prompt and certain arrest; the offences practised will be those generally committed by vagabonds when they desire to procure board and lodgings for the winter", *e.g.*, insulting the police, disturbing public worship, or any crime rapidly committed, and needing no preparation. The police may therefore safely not trouble about those small offences committed in words, such as insulting the police, the Courts, or the power that be, especially if the words have not been heard by other people and it is impossible to discover the reason for their commission at the particular moment. If this reason is difficult to discover, it is because it has been carelessly and intentionally hidden, and the police constable would do well not really to fall in with the wishes of the offender and assist him to fulfil the service with which he is charged; he will then notice a hastiness on the part of the individual in question to commit some serious offence, which will thus betray his desire to be arrested. The prudence of the constable thus warned may then be redoubled, and he will have every facility, while consenting to the desire of the criminal to be arrested, to keep his eyes open so as to find out what it is that the latter wishes to hide. In India, such accomplices have ready refuge in "a night case,"—a bait which no Indian policeman can resist swallowing with avidity.

"The following anecdote told of Count Sandor, a person well-known for his jokes and eccentricities, proves how easy it is to get one-self arrested. About the year 1830 the Count made a bet with the Chief of Police of Vienna that he would get himself arrested without having done anything in the least reprehensible. He disguised himself as a vagabond and drank in a disreputable drinking shop a glass of brandy which he paid for with a genuine thousand pound note; ten minutes afterwards he was arrested. But if Count Sandor succeeded in being arrested without having committed anything reprehensible, the expert swindler will succeed much more easily, as it costs him little or nothing necessary to commit a real offence, if the success of the coup is worth it."

"The lesson to be drawn from the preceding consideration is therefore as follows: the detective should not lose sight of the fact that the suspicious behaviour of a man may always have some connection with a guilty act which is being committed, and that this is all the more likely when the person in question, inoffensive as he seems to be, cries out on the approach of a policeman on his beat or any outsider: he must therefore pay particular attention to what is going on. Doubtless, in many cases, it will be impossible to prevent the watcher from carrying out his design, especially when he sees the police first; and yet, even in this case, it would be a fault to be no longer anxious. Suppose that an individual who is lying on the ground whistles on the approach of the police, so as to inform his companion that there is danger; of course the effect to the alarm cannot be prevented but if as is usual in large towns, two constables make the beat together, one of them can occupy himself with the person who has just whistled while the other will try to find out as far as he can whither the whistle was directed and whom it was meant to reach, and then short discover the place where the theft is being committed and take the necessary

steps. If the policeman is alone it will nearly always be better to prefer the certain to the uncertain and make sure at all events of the suspected individual; then he can call for reinforcements to look after his capture while he himself goes off to discover the main case. In many instances a noise is sufficient to make criminals seek for safety; it is better therefore at once to look after the individual arrested and the case will soon be cleared up. The sprained ankle will soon get well, the drunkenness will be found to be quite a pretence, no papers of indentification will be found on our friend, and after an attentive examination he will be recognised as an old offender. One individual of the band being in custody, the search for the others will be simplified to a great extent. The role of watcher is best filled by a woman, particularly a girl of 14 or 15 years old. A woman is more patient, more attentive, more cunning, and more reflecting than a man: she can count less upon bodily strength, quickness of fight, and personal courage, all of which qualities she is obliged to replace by an indefatigable attention, a straining of all her senses and an ability to take advantage of all circumstances—qualities which naturally obtain for her this position. A woman is less suspected than a man, she excites compassion and needs assistance and protection; every man feels himself forced in spite of himself to offer assistance to a woman whom he meets alone in the middle of the night. Moreover, a woman can make use of a number of situations in which she has a chance of invoking some one's assistance, situations which thanks to her sex, she alone has at her disposition; she is more easily exhausted by fatigue, has more frequent fits of feebleness and is more often in need of help than men; she can be turned out of doors by her husband, can be overtaken by the pains of child-birth, may be obliged to wander without a situation and without shelter and she may be exposed to all the tortures and in addition she has at her disposal the whole domain of sex. A woman alone and in the middle of the night, especially if she is young and as often as not in the darkness of the night, pretty, will nearly always succeed in stopping a passer-by and, if he does not accost her, she will know very well how to speak to him and make him stop. Nothing is more natural than to ask him a question, make a request or utter a complaint in his presence; nothing is easier than to get him to stop if not altogether to turn him from what he is about; and if the woman pretends to be ill, unhappy, hungry, etc., there is no one brutal enough to quietly continue on his way. We have said that it is the young girl who succeeds best in the task. She will generally be met with crying discreetly, she is questioned with sympathy, and the little one then tells with sobs how she has been turned out of doors by her cruel step-mother and does not know where to take refuge; she will not go home where she has been so maltreated for anything in the world; this very day she had been beaten so hard that her body is all bruises; naively she pulls up her sleeve to show the bruises—which however, do not exist; she has them also on her legs, and, childlike, she lifts up her little dress to just below her knee to show the marks of the blows. All this can but excite the interest of the compassionate man; he has seen no bruises but he has noticed a nice white arm and a well-rounded leg; and then the little one babbles so prettily; she is almost willing to accept the hospitality her new protector offers her for the night, but all at once she changes her mind, for she has heard a light whistle which informs her that theft is successfully carried out, she decides to look for a friend and presto! she is gone. We all know these sort of stories, which are indeed more numerous than we suppose, for people who meet

## CROSS-EXAMINATION

with such adventures are hardly ever willing to relate them.

"A rather amusing story may be told in this connection. The student on arriving home in the middle of the night had just opened the front door and entered the lobby when they heard the most dreadful groaning coming from the back garden: they at once ran to the spot from whence came the cries and perceived a woman on the ground, seemingly suffering from the pains of child-birth. Without leaving the students time to inquire how she had got over the high hedge which surrounded the garden, they entreated them to lay hold of her arms and hands, adding that she had need of nothing else and was well aware of what it was, etc. After a few moments she declared that it was time to find, as quickly as possible some woman in the house; hardly had the two students got up, when three men rushed out of the door, the woman was also on her feet and all four bolting across the garden disappeared through a hole previously made in the hedge. The amazed students were soon able to find out that the first floor, whose tenant was in the country, had been broken into and stripped."

"To keep guard in the interior of a house is the most difficult part of a watcher's business. He must have self-possession and presence of mind to be able to justify his being in the house or even, when it is divided into flats, inside a particular flat. The most incredible examples of effrontery are met with on the one hand and on the other of, let us call it, credulity. A case may be mentioned where the actors were gipsies. A well-to-do peasant having carefully shut up his house had gone to work in the fields; on returning home to fetch something, he found to his great astonishment, the front door open and a gipsy woman in the corridor who, on sight of him, began to blow him up for having left the house open; she added that she had visited the stables and found an animal very ill indeed. The peasant made in amazement for the stables and at the same time a gipsy escaped from one of the rooms through the corridor, whence he made off along with the woman, carrying away the peasant's money and watch. Of course there was nothing the matter with the animal. Even in presence of the police the position of a women-watcher is much easier. It may be too much to say that women try to seduce them with their advances, that is exceedingly rare—but it is nonetheless true that a policeman, as much as any man, generally shows more regard and compassion to a woman than to a member of the male sex. Without wishing to blame them yet we must never tire of pointing out to them by examples that a woman is as a rule a more cunning scoundrel than a man, and in the present connection it would be as well to suspect every woman whatever her age, whom one meets alone in the middle of the night. Genuine cases of women suddenly overtaken with the pains of child-birth or illness, or who have been turned out of doors at midnight by an unsupportable husband or step-mother, or for some other reason, are exceedingly rare, and in such cases the utmost prudence is necessary." See Hans Gross, Criminal Investigation. "The police constable infers from the discovery of a watcher that a theft is going to be committed in the vicinity about the same time—a theft of which he as yet knows nothing, it is very rare on the other hand that an individual is brought before the Commissioner of Police or Magistrate for watching or whose arrest is a certain indication of as yet an unknown theft. Usually the crime is reported and no one knows whether any one has come across a watcher in the neighbourhood of the scene of offence; but if the question is not looked into, it may happen that the watcher for the entire band of thieves is lying."

at the Police Station for "drunkenness", while the Inspectors and Investigating Officers are deliberating over a bold burglary and lamenting the absence of the least trace of a clue to the criminals. "So far we have only considered watchers employed in cases of burglary or sneak-thefts (*i. e.*, secret introductions into houses); we shall now say something about those met with in other branches of the profession. Besides their role of watcher they have [often another mission as well, namely to screen and divert attention from the actual thief, in short to facilitate him in his work by all the means in their power. Let us here repeat that there is no graver error than to try, whilst in the midst of difficult investigations, to reach one's goal right off and immediately lay hold of the criminal; one rarely succeeds at the start and it is generally by a detour that we obtain our first results, which then enable us to march straight ahead. No doubt this depends on the manner in which the theft is committed; the actual thief tries to remain as little in the foreground as possible, while the assistants and watchers can and ought often to expose themselves for his sake. Hence we question the victim of a pickpocket to try and find whether he has not noticed any individual brushing against him in a peculiar way, or touching him, or whose general bearing has been suspicious; the answers to our questions are generally negative and, if we are contended with these first answers, have hardly any chance of laying hands on the pick-pocket; the attention of the victim must therefore towards all persons who have been strolling near him, have accosted him, asked for some information, requested a light for a cigar, or who have tendered him any kind of service; these confederates may have drawn the victim's attention to some object or other, such as one of the beauties of nature (a rainbow or sunset), or a remarkable picture in a gallery, or perhaps some comical or dangerous situation in which third parties are mixed up. They may have seized him all of a sudden and drawn him to one side to prevent him from being run over by a carriage or over-turned by a man with a bundle; if dirty they may have sympathetically brushed him down, they have asked him whether he has not lost his handkerchief or something else." *Ibid.*

"The task of the auxiliary of the shop thief is quite analogous to that of his comrade the pick-pocket's assistant. Thefts in shops and in similar places such as open bazaars and markets, etc., are much rarer now-a-days than formerly. The number of thefts in markets has probably diminished because the owners of stalls and shops keep better watch and there are more police about than in the old days. "The most frequent and most important thefts are those committed in jeweller's shop. There are always two thieves, one coming in a little later than the other. It can be easily understood how the shopkeeper alone in the shop with a customer difficult to please, loses his head when he sees a second customer comes in, who appears to be impatient and seems as if he would make good purchases. One sees a jeweller who is not perfectly at home in his business and hardly a man of routine, become quite nervous in such a case: he runs from one customer to the other, then back again to the first, bangs his boxes and cases about, pushing them here and there, and does everything rather than properly guard his valuables. It does without saying that the first customer has taken care, before the arrival of the second, to mix up the articles, taking them out of their boxes and cases, placing them in a heap, and in short doing everything to prevent their being efficaciously watched; then when the second is already very impatient, he ends by selecting his jewels and has them addressed to his hotel, where naturally he will pay for them on delivery; at the same time he does not forget to steal all he can. Hardly is he outside when the second customer starts his work, that is to say, he keeps

the jeweller out of breath so as to give him no time to immediately do and arrange his jewels and so discover whether he has lost anything or what. If need be, a third arrives while the second is still in the shop, and during all this time the thief gets the stolen articles safely away. 'The worn methods of thefts from jewellers are well enough known—how sickly, coughing purchaser drops his handkerchief on the jewels display in order to remove one; how another lays a visiting-card with sticky stuff on the back upon a diamond; how a lady throws into the hat of a bearer who comes into the shop a coin, and with it some stolen rings; how Mr. T. buys, the salesman or commissioner accompanies him to the door of the house, and the door shut in his face—these are things that are always to read in the newspapers. How many thefts of jewels are effected is illustrated by a story which Griffiths heard at great London jeweller's shop. He is partly for amusement, a large brilliant lying apparently free, but in reality protected by an unbreakable immovable, and practically invisible glass plate. The jeweller assured Griffiths that it was incredible how many attempts were made to remove this jewel "lying about", and often in the most wily manner. A much favoured method is for a thief to appear in a shop and place a lump of wax or some sticky stuff underneath the projecting glass counter case. He then ask to see many things, fixes his attention on something small but very valuable, catches it at the right moment, and places it on the wax, which cannot be seen from any part of the shop. If the shopman misses the jewel, the thief allows himself to be searched; if followed in the street, he is quite sure that it is not on him. A few days later an accomplice comes to the shop and takes the ring or other valuable away, unnoticed and without danger. The first thing to be done, to throw light on the concomitant circumstances of this category of theft. It often happens that the victim of the theft has absolutely no idea which of the customers has robbed him; before their arrival his stock was intact, and after their departure many things were missing. In such a case the fault is often committed of suspecting all but only one believing that only one is guilty. Hesitation and uncertainty is the result; suspicion is thrown upon all but only one can be arrested. Equally bad is to allow the victim to nominate one of the two or three customers as the presumed thief because he seemed perhaps to be more awkward, or because he was not so well dressed, or because he discovered the loss of a jewel after his departure and to be led into the mistake of tracking that person alone, though he has already got clear away or at all events is no longer in possession of the stolen article." See Hans Gross, Criminal Investigation.

#### **Accomplice of Pick-pockets in Railway Train or on Road**

A number of thefts are committed by pick-pockets in railway trains as well as in places of public entertainment where there is a crowd of people. They always have a few accomplices with particular duties assigned to them. Their method of working is best illustrated by Dr. Hans Gross in his well-known book 'Criminal Investigation'. "All such questions are put with the object of assisting the thief to touch and examine the person questioned or else cause the latter to examine his person, thus drawing his attention to that part of his body touched and rendering him incapable of feeling any other contact effected soon after. This requires some explanation. The human body has a general sensibility, and a sensation already localised is easily confounded with another analogous sensation effected on another part of the body, though, as a sensation, the latter has hardly any independent existence,—presuming this second sensation is not vigorous enough to annihilate the effect of the first,

The psychu-physiological peculiarity besides being remarkable in itself will explain more than one case of pocket-picking which might otherwise appear impossible. These statements may be proved by an experiment which requires certain preparations. Two persons A and B plot to carry out the following on a third party, X. A all of a sudden gives X a blow with the elbow on X's right-side, excusing it by making some such explanation as "Look" "stop", etc. Soon after B will in his turn give X a blow with his elbow, but on X's left side and with less force than A. The most difficult part of the experiment is to discover the exact moment when B should strike; he will strike too soon if X's attention is not sufficiently fixed on the point indicated by the blow and cry of A, and he will strike too late if X has had time to recover from the blow and cry of A; to strike with profit B must seize the exact moment when the sensation caused by A has reached its culmination. If the experiment is successfully carried out, X, when questioned as to what he has felt will be sure to answer that he felt the blow and heard the cry of A and that he immediately afterwards felt a new sensation of that blow but harder or more prolonged; as to the blow given by B he has not noticed it as such. The effect of the blow given by B does not therefore produce an independent effect but becomes added to the effect of the blow given by A, although the former was given on the left side and the latter on the right side of the body. In practice the experiment is verified by the following example:

"One afternoon a gentleman had his inside coat and his overcoat slit open and his pocket-book containing a large sum abstracted from the breast of the former, he had not felt the slightest contact and yet to make the slit, which was in the shape of a cross, the operator, however skilful and circumspect he might have been, exercised fairly considerable pressure. Moreover to get the pocket book out, it must have been pulled with some force, for the slit was not sufficiently large to enable the pocket-book to drop out of itself. Added to this, that the gentleman had noticed nothing extraordinary, had been in no crowd, nor been run up against or elbowed about, in short nothing suspicious whatever had happened to him. At last after many questions he began impatiently to remark that he had seen something, but he had absolutely nothing to do with the theft in question. He then stated that an old gentleman, exceedingly well dressed, who happened to be following him, had remarked to him with the utmost politeness, that he had stepped in some filth; the old gentleman added that he had been following him for a considerable time and had noticed an unsupportable odour and this would be very disagreeable if our victim intended to pay any visit. The latter thanked the old gentleman and stopped to look at the sole of one of his shoes, then, finding nothing he raised the other leg to examine his other shoe. At this moment the old gentleman seized him firmly by the arm and exclaimed laughingly. "It is not easy to stand on one leg, you were nearly over just now; but I see you have nothing on the boot either; it must have been myself who has stepped in something and I have been laying it on your back—or rather under your feet!" The old gentleman laughed most heartily at this "amusing episode" and that very evening was arrested as an accomplice of the pick-pocket. It was proved later on that the real thief had in slitting up the coat, naturally taken advantage of the moment when the "old gentleman" had seized his victim by the arm on the pretence of preventing him from losing his balance and falling."

"The procedure of the pick-pocket's accomplice depends on the circumstances under which he 'operates', and what chiefly characterises pocket-picking is that it is always, or nearly always, committed with the aid of a comrade. It is best to admit that a pick-pocket rarely steals by himself; in most cases he is seconded by one or more helpers, either men or women. The railway thief

has nearly always a woman with him. In Europe if he be a high class operator he travels first class and in express trains, or he may appear to be a respectable old countryman who travels third or fourth class with the country folk; in both cases he will generally be accompanied by a woman who will occupy the victim with her looks, talk, or something even still more intimate. The procedure is nearly always the same. The most difficult part is the choice of the victim; and the latter ought to be well to do, not too intelligent, and not insensible to "a bit of fun." The pocket-book must be a fat one, and visible in the left inside pocket, and with respect to this, every pick-pocket who wishes to live by his trade possesses an excellent eye. It is a mistake to suppose the railway thief only travels at night; all detectives are aware that these kinds of theft take place as often by day as by night; for an expert pick-pocket is not afraid of the light and he knows that travellers look after their valuables more carefully at night than in the day time. It goes without saying that the thief and the woman who goes with him do not appear to know one another; one of them gets into the carriage first and looks about for the information mentioned above. If there is nothing tempting, he gets out again, but if business can be done he makes a sign to the accomplice to follow. It is generally the man who gets in first, for it is easier for him to do the necessary exploring, to walk on the platform look into the carriages and get in and out of them if necessary. In the day time they will do their best to be alone in the carriage with their victim, at night on the other hand a number of passengers does not worry them, for railway carriages are generally badly lit and the thieves trust to most of the passengers dropping off to sleep. As to the order in which the travellers sit, the real thief must at any price be beside the victim and the confederate who has to occupy the victim's attention must be opposite him; the thief takes part in the conversation for some time and then drops off to sleep—but he takes care to lose sight of nothing that is going on; he nearly always has a sham hand on the other side next his victim; this false hand is joined to the real hand on the other side and rests upon the knees while the real working hand is hidden under the large folds of his cape or cloak and is ready to be thrust out at the side at any moment; when the victim is engaged in animated conversation with his *vis-a-vis*, the true hand of the thief begins to move; if this movement is awkward and is perceived by the victim, he is soon re-assured on seeing the clasped hands of his neighbour who is beginning to snore. The theft once committed, one of the two gets out at the next station, and the one who gets out first is always the person carrying the purse or pocket-book; this is hardly ever the thief himself, for the latter endeavours as soon as the theft is completed to skilfully pass the pocket-book to his confederate, who of course is quite harmless in everyone's eyes; indeed if the theft is discovered before the pick-pockets have got away, the actual thief willingly allows himself to be searched and his confederate is exempt from any suspicion, for how can people who are seated face to face and talking steal from one another? As a rule the second cut-purse gets out at the same station, and nearly always under the pretext that the first has forgotten something which ought certainly to be given him. Naturally the train starts before he comes back. When dealing with one of these railway carriage thefts the following points should be borne in mind, especially the examination of the person robbed and the witnesses. "As a rule the former makes no mention of the thief's helper, unless the helper was a man; when the helper was a woman she is never mentioned; either he does not like about a woman whose acquaintance he has struck up in a railway carriage, or he does not think it worth mentioning 'as she did not know the person suspected'."



or 'appeared to be so natural,' or 'she was so well bred that it is quite impossible to suspect her of the theft.'

"Another way to recognise these people is that one of the two never tells his destination, for indeed he cannot get out before the theft has been committed; it is more often the actual thief who says where he is bound for—generally a fairly long journey—for he only follows the companion to whom he has passed the spoil under the excuse of giving him something he has forgotten. When the fact of the theft has been promptly discovered, it is often possible to catch the thieves by keeping watch at the two neighbouring stations, on each side of that at which they have got out; they never entertain again at the same place, but go on foot to the nearest station up or down the line, whence they take a train back again, or perhaps in the same direction as formerly in order to make use of the rest of their tickets."

Mr. Mulla gives an interesting account of the methods of train gangs in India. He states: "The railways are their most lucrative fields of work, and each gang has its particular beat; they seldom encroach on the hunting ground of others of their fraternity. Starting in a gang of 4 or 5, accompanied by women and boys, they occupy separate compartments—some disguised as traders, others wandering minstrels—and the women, as respectable travellers, occupy the compartments reserved for their sex. Adept in the art of entertaining their fellow travellers, they soon learn for what purpose they are journeying, and when the unsuspecting traveller falls asleep, his jewels and valuables are taken; the thief leaves at the next station, and the gang unites at a place previously agreed upon, where the loot is divided share and share alike, with two portions for the successful thief. Night trains are usually selected, and they are always to be found in special trains running for the convenience of pilgrims and others attending festivals when, women are always decked out in jewels. An instance of their cleverness may be quoted from the writer's experience at a busy junction at night, where changing of trains is necessary, two unsuspecting women are travelling and much distressed at the confusion. A "respectable native gentleman" proffers his assistance, which is gladly accepted; he finds a compartment for the women and helps them in with their goods and chattles, and asks permission to accompany them; this is accorded, and he amuses the travellers with anecdotes. The elder of the women is the custodian of the jewels; she is therefore warned that the safest place for her to keep the bag containing the valuables is under her head when she sleeps; this is unsuspectingly done, and in the morning when the women awake they find the bag ripped open and the contents gone; their civil friend, needless to say, has also gone. He was afterwards arrested disguised as a travelling musician, and told the writer that for seven years he had been carrying on this lucrative trade."

A mass of interesting and instructive information as to these ubiquitous criminals will be found in the little book on "Railway Thieves" by Inspector M. Paupu Rao Naidu, Madras Railway Police. We here quote a passage describing the methods of the Bhamptas. This tribe, apparently originally from the Deccan, is spread all over India, so that Bhampta has become a common name for a thief in general, just like "Campemari" in Madras. The author says:—"Each batch of men goes to a station dressed in some sort of disguise or in good ordinary clothes, taking a canvas or carpet bag, or at least a bundle with them, and purchase tickets for some place far or near. In their bag or bundle they invariably have one or two coloured turbans, two or three coats, a knife, a pair of scissors, mirror, a chisel about



six inches long and half an inch broad, a long tin-case of "Chunam," "Vibhooti," "Namam" and "Sreechurnam," to put on different marks on their foreheads, a string of beads and a few old clothes. They also carry trinkets such as rings, bangles, buttons, nose rings, etc., of very trifling value, which their females expose for sale on road side to show ostensibly to the public that it is their means of livelihood. They will make the other passengers understand that they are on a pilgrimage to Ramesvaram, Tirupati, Hampi, Jaganadham, Kasi, Haridwar, or any other religious place on the railway line in which they fix their game. They look out for passengers also having bags which seem likely to contain anything valuable, and they follow such persons into the same carriage, and, sitting near, endeavour to enter into conversation, and ask them where they are going and at what station they intend alighting. After a time, when it begins to get dark, or if it is already dark, the other passengers begin to drop off to sleep. Then one of the Bhamptas, on the pretext of making them more comfortable, lies down on the floor, and covers himself with a large cloth under the pretence of going to sleep, while his confederate, stretching his legs on the opposite seat, spreads out his cloth, thus more or less screening the man lying beneath. This latter, when all appears quiet, begins manipulating the bag he has spotted under the seat, to feel with his hands if anything valuable is there, and if he cannot succeed in getting his hand into the bag, he takes from his mouth a small curved knife, which all Bhamptas carry concealed between their gum and upper lip, and with that he rips the seams of the bag and takes out what he finds. If the curved knife is not sharp enough to cut the strong canvas, he uses the other knife he has with him, and if the article spotted be a tin or wooden box, he makes use of the chisel in forcing it open, generally at the lock, and transfers the contents to his bag or bundle, or passes up what he had stolen to his confederate, and, at the next station, the two get out of the carriage, and either leave the train altogether, or get into another carriage. Should there be any complaint of loss, they throw away the things out of the widow. They note carefully where the property has been thrown out and, leaving the train at the next station, go back on foot along the line, pick up the booty, and make off with it across country. Train thieves carry little or no luggage; in the first place they have no need for any, and then their movements are freer when looking for their carriage, changing their compartments or places, and getting in and out of the train, etc. If the victim has some little acquaintance with and is a good observer of mankind and thinks he will not have much trouble in noticing that these people seem suspicious. If they are in a carriage with country people they give themselves the airs of decent peasants, but their hands are in no way spoiled by work, their shoes are not those generally used in the country, and their knowledge as regards agriculture seems to be at fault; if they have set up to be extremely elegant it is still more easy to unmask them, for there is always one place where their elegance is threadbare—the shirt." See Criminal Investigation by Dr. Hans Gross.

#### Illustrations.

(i) Rufus Choate was examining a seaman who had turned approver against his comrades who had stolen moneys from the ship on a distant shore. The witness stated that the other defendant, Mr. Chote's client, instigated the deed. "Well" asked Choate, "what he did say? Tell us how and what he spoke to you." The witness replied, "He told us, there was a man in Boston named Choate, and he would get us off if they caught us with the moneys in our booty." A prodigious roar of mirth followed this truthful satire.

(ii) The cross-examination of approver in the famous murder trial known as Newington Murder Case is equally interesting and instructive. On 15th October 1919, Principal of the College, Mr. De la Hey was found shot dead. His wife who was near him saw nothing. Suspicion fell on Zamindari students in the school. Singampatti was made approver and Kadambur was put on trial. The case was transferred to Bombay High Court and was tried by Mr. Justice Sir Norman Macleod. Mr. Wadia appeared for the defence, while Mr. Weldon for the Crown.

The following extract is from the report in the famous newspaper "Hindu" of the first week of February, 1920. Which recites the evidence of the approver, minor Zamindar of Singampatti.

Witness said that he was sixteen years of age. He was one of the pupils in Newington and joined it eight months before the murder Mr. De la Hey was the Acting Principal. He knew the accused only after he joined Newington. He knew there was some misunderstanding or ill-feeling between De la Hey and the accused. Kadambur had told him that De la Hey did not treat them well and called them uncivilized Hindu Tamilians. He knows the night De la Hey was shot. At 7-30 that night he was sitting on a sofa in the billiard hall. Junior Urkad and Talavankote were in the hall. The former was standing near the sofa and the latter was lying on the pingpong table. Kadambur told witness that De la Hey must be shot as he ill-treated them all and called them uncivilised Tamilians. Witness told him that De la Hey had not said anything about them at all and might have made remark only against the accused personally, and that after all he was a teacher. Shortly after, Kadambur told him that if they were to remain in that hall and go on talking, Talavankote would go and reveal everything and that therefore they should go outside the hall. Accordingly Kadambur, witness and junior Urkad went outside. Kadambur then told him that De la Hey must certainly be shot that night and insisted that witness also must go along with him. Witness did not say anything in reply. After a while Kadambur said that he would shoot De la Hey and that if he missed aim and De la Hey woke up, witness must shoot him or if hearing the report of the gun, Mrs. De la Hey woke up, she must be shot. Witness told Kadambur that he would not do so. Continuing, witness said:— Then I went away to take my bath. After bath, I went to the billiard hall where I found Kadambur and junior Urkad. Kadambur took me to his room. He did not tell me why he went along with junior Urkad. When I got inside the room Kadambur produced two guns from the corner and asked me to clean one of them. I had seen these guns before. They usually remain in the same corner. I cleaned one of the guns and Kadambur cleaned the other. Immediately after Kadambur went and opened the almirah, out of which he took three cartridge cases. The almirah, was locked. Kadambur unlocked it himself. I also went to the bath-room with Kadambur where the almirah was kept. Kadambur said to junior Urkad, 'We are going to examine if the cartridge is all right; if any one comes inform us' Kadambur when inside the bath room, bolted the door and switched on the light. He picked up the cartridges one after the other and asked me if they would fire well. I said they would. Kadambur picked up ten or twelve cartridges and asked me to pick up five or six which I did. While doing so I heard some noise outside the bath-room. There is a sort of platform at the place where bath is taken. I got upon it and looked, but I couldn't then have known who it was that was inside Kadambur's room. Some boy tapped at the bath-room door. There it was that I heard the voice of senior Urkad. He knocked

at the door saying "Kadambur, Kadambur." Eventually Kadambur opened the door and went out. I also went with him. Kadambur went and kept the cartridges at the dressing table. He suggested to me that five or six more cartridges should be taken and placed in the other drawer of the dressing-table so that people might say that it was somebody else who shot De la Hey. Afterwards Kadambur told me that he must positively shoot De la Hey that night. Otherwise somebody would go and give information to him. Even then, I refused to go. He said, "If you don't come, I shall deal with you." Junior Urkad was with us. I then went away to take my food. When I came back to the billiard hall, Berekai and Saptur were there. De la Hey came from the club and went straight upstairs. He didn't say anything to us. He went in a happy and dancing mood daily. De la Hey used to come back from the club at 8 o'clock. On this particular day, he came at 9 or 9-30. On his return from the club De la Hey would sometimes speak to the boys and sometimes not. After De la Hey went, Kadambur said that he had informed senior Urkad that he was going to shoot De la Hey and that the senior Urkad was pleased about it. I then went back telling Kadambur to do as he pleased. Some time later Talavankote went upstairs to Berekai and told him 'Kadambur was bringing guns and cartridges. You had better go and inform Dorai.' He was then standing near my bed having just return from outside after a smoke. Ten minutes later Kadambur came up and told me, "You should not sleep away at 12 or 12-30. I shall wake you by my finger, you must come along with me. Don't fall asleep." I then went to sleep. Some time later, somebody woke me up. I opened my eyes and saw Kadambur. It was good moonlight night. Kadambur pulled me saying, 'Come along.' Even then I said I would not come. Thereupon, Kadambur told me, "I will shoot you first and go and shoot Dorai Sahib." I got afraid and accompanied him. He asked me to take one of the guns and go along with him. I then went. (Witness at this stage described the route followed.) On reaching De la Hey's office room Kadambur asked me to stay by the side of one of the easy chairs and said he would go further up. Continuing, witness said he told me, "If I miss and De la Hey gets up, you should shoot him or if the lady gets up, you should shoot her or if anybody else turn round, you should shoot them." I could see a portion of the cot from where I was standing. I could see De la Hey above his waist. Kadambur fired two or three feet away from the cot. Immediately I ran into the office room. There is a staircase in the room used by peons. Along this staircase, I ran upstairs and behind me Kadambur also came up running. After coming up, I had thrown my gun over the balcony. Subsequently I saw Kadambur pointing the gun towards his chest and pulling the trigger with his feet. I heard a clicking noise. So I ran up to my bed and lay down. Kadambur ran straight to his bed. Two minutes later Mr. De la Hey uttered a big cry. I did not go down. Some time after the police came and woke me up. I got up and afterwards I was arrested.

*Cross-examination of the Approver Singampatti.*

Cross-examined by Mr. Wadia, witness said, "I went to Newington in March last year, I was arrested on the 16th October. I didn't know Kadambur before I went to Newington. It was only after I went to Newington that I touched the gun. I was on friendly terms with the accused. Myself, Kadambur and Saptur used to go out shooting game and we all shot alike. I was only clever like other people."

Mr. Wadia.—“Your father is a very wealthy man?”

Witness.—“Fairly wealthy. I can't say very wealthy. My father keeps a gun and he used to go shooting game. I used to go and stand and see the fun, but never handled a gun myself before I came to Newington. I don't know if the accused is as good a shot as myself. I don't know if he knew how to clean the gun after game hunting. Sometimes Kadambur used to clean the gun, sometimes myself and sometimes Saptur. The room of the accused was on the ground floor near the tennis court. Some of the sports articles are kept in that room by the wards. These two guns could be used by anybody. The accused never used the first floor for sleeping. I don't know if the key of the cupboard would fit all other cupboards. Cartridges were the common property of all.”

Q. “Do you wish to suggest that the wards allowed the accused to lock them up?” A. “Yes we did.”

Q. “Why?” A. “Mr. De la Hey himself had ordered that they must be in Kadambur's room.”

Q. “You went to Newington to study or get a bride?” A. “I went there to study.”

Q. “Is this your father's letter?” A. “Yes.”

Q. “You went to Newington to make friends with senior Urked with a view to marrying his sister.” A. “I don't know that.”

Q. “Didn't your father put you in Newington with this view?”

A. “I didn't know that my father took me there for this purpose.”

At this stage Mr. Wadia commenced reading the letter written by witness's father, identified by witness. Just then Mr. Wadia had only got as far as “My Dear Pate” when Mr. Weldom objected to reading the letter and wanted to know in what way it was relevant.

His Lordship after reading the letter enquired, of Mr. Wadia how it was relevant. Mr. Wadia said that his point was that the witness and the other man had shot the deceased. Witness had denied that he went to Newington to marry. This letter would prove otherwise. His Lordship ruled the letter wasn't relevant and said, “Sons don't know what fathers write.” Replying to further questions witness said he had no idea at all that his father sent him to Newington with a view to marry. His father had been telling his mother that he wished witness to marry Urkad's sister.

Q. “Even now you want to marry her?”

A. “That is left to my father's pleasure. I must obey him.”

Continuing, witness said that up to 24th October he was in the dock along with the accused. He had two legal advisers. On the 24th October at 12 o'clock his counsel offered him as Crown witness. After all other witnesses had been examined by the Lower Court, he was examined at 3-15 the same day. His pleader didn't prepare the statement he made on the day of alleged murder. His father wasn't in Madras but his father's estate manager Shanmugam Pillai was in Madras. He didn't know if Pillai was a retired police officer. His father saw him in jail once or twice. Pillai daily brought him provisions.

Q. Are you a nervous man?

A. How can I say if I am nervous or bold? (Laughter)

Q. You are not nervous to-day? A. No.

Q You are not frightened of the accused always? A. No continuous witness said he was afraid accused might shoot him. He was in fear and his mind was not perfectly under control.

Further cross-examined by Mr. Wadia, the approver said he did not know if the accused Kadambur was the poorest lad in the whole school. He had never heard before that he and accused belonged to different sects. He did not see two guns secreted in his room on the evening of 15th October. He did not tell the accused in the Billiard Hall. 'All right; we will shoot De la Hey.' If Talavancote said so it was no doubt he used expressions "all right" with reference to getting out of the billiard room and going into the back verandah. On 15th October he was given impositions by the deceased. He was actually prevented from joining the game of cricket in consequence of this, but he wrote the impositions and then went to the cricket by 5 or 5-30 P.M. He did not witness any instance of the accused being punished by De la Hey. Asked if any harsh words passed between the accused and De la Hey, witness said Kadambur had told him that the deceased had used harsh expressions against him. He hadn't heard anything personally. The last time witness went out shooting at Newington was 12th October. That was Sunday. Saptur, Kadambur and junior Urkad went with him. They returned by 1-30 p. m. or so. It wasn't true that Kadambur was witnessing cricket match from 11 A. M. that day. They all went to see cricket match in the afternoon. Continuing witness said that Urkad was his relation. He was his maternal uncle's son. They were friends from childhood.

His Lordship remarked that he gathered from Mr. Wadia's question yesterday that witness went to Newington to cultivate Urkad's friendship.

Mr. Wadia said his suggestion was that Urkad was favouring another boy and witness went to Newington to move with Urkad closely. Witness proceeding said that he and Senior Urkad were not great friends nor did they dislike each other. He did not remember having talked to Senior Urkad about the plan for murdering De la Hey. Asked if on 15th evening, Saptur and Kadambur were not playing billiards the whole of the time, witness said his recollection was they were not. Saptur appeared a good boy. He had no doubt about it. Witness denied that on 15th October himself and accused locked themselves up in his (witness's) bed-room and had conversation about shooting Mr. De la Hey. He remembered Kadambur coming into his room which wasn't subsequently locked from inside. He didn't say he would shoot Mr. De la Hey. He tried to conceal the gun and eventually threw it away because he was nervous and quite confused. He was quite sure he didn't fire the gun found near the urinal with five cartridges near by. One with which De la Hey is alleged to have been shot was not the gun which he had carried. He carried the gun to De la Hey's office because Kadambur threatened him. He didn't know if the hammer gun he carried was cocked. He did not go down when Mrs. De la Hey shrieked. If Mrs. De la Hey had sworn that he came down, she might have perhaps down so in her confusion. It wasn't true he was dressed up to neck as a sort of disguise. Senior Urkad was the heir to Urkad estate. The first time wards of Newington went out shooting was on Dusserah day.

At this stage Mr. Wadia produced two letters written in Tamil one by the accused to witness and the other by witness to the accused while both were in the custody. Witness identified the letters which were

tendered as exhibits. the Tamil interpreter translated them with some difficulty. In the letter witness wrote to accused, which was in reply to one written by the latter, it was stated by witness that *they both trusted Urkad and, as a result, had come such a pass. That statement witness had made as approver was prepared by his pleaders and that accused should not be displeased. The letter finally inquired what statement accused proposed to make next day in his defence.* Mr. Wadia then continued his examination.

Q. It is true your father saw the accused in jail and talked to him?

A. Yes.

Q. You were present at the time? A. Yes.

Q. What did your father tell you?

A. Don't be sorry and speak the truth.

Q. What did he tell the accused? A. Don't be sorry. It cannot be helped. Every one must submit to his fate.

Q. Did not your father tell the accused to keep his mouth shut and that he would first make you approver and then get him out?

A. I don't remember he told him that.

Continuing, witness said that the conversation took place in the Madras Jail before he had made his statement as approver. Witness was next questioned with reference to his statement in the letter of the accused produced in Court that his statement as approver was prepared by his Vakil and he was only speaking according to that. Witness said that the letter was not written of his own accord. Accused and himself were in different cells in the Madras Jail. After he was made approver accused complained of his action and inquired whether both of them should not get out. Accused told him that Dr. Swaminathan and Ethiraj had obtained a letter from minor Chundi to the effect that although Singampatti and Kadambur had planned shooting De la Hey, as a matter of fact it was Berekaï who went and shot the deceased and that these two legal advisers wanted the letter from the witness. The statements he had made in this letter were untrue and were made in his anxiety to come out of the jail and he was assured that such letter would help him to get out, that he wrote the letter when the warder came and told him that Kadambur was very much annoyed with him, was weeping, and was not taking his food. Witness felt pity and wrote that letter which was delivered to Kadambur.

Q. I put it to you that you were in conspiracy with Urkad and that it was you and Urkad that went and shot De la Hey.

A. Not at all. Raja of Ramnad was a relation of Urkad. He was opposed to De la Hey and had opposed his being taken on in the new Rajkumar College with which Newington was to be merged.

Mr. Wadia then explained that De la Hey was an applicant for the post in the new Rajkumar College as Newington was about to cease. The Raja of Ramnad had opposed the appointment in the Rajkumar Council and De la Hey was given notice.

His Lordship said Mr. Wadia's question yesterday and the answer that De la Hey was under notice conveyed a different impression.

Mr. Wadia said that all he meant to being out was that De la Hey was not going to be taken in the college and was under notice as Newington was about to be closed.

## CROSS-EXAMINATION

In reply to further questions, witness said he didn't hear De la Hey calling the Raja of Ramnad a Negro seething with sedition, but he had heard about this from Kadambur. Witness denied that Senior Urkad put him to shoot De la Hey because Urkad was a relative of Ramnad and resented De la Hey's remarks. De la Hey had never called witness uncivilised or barbarous Familiars.

Mr. Weldon at this stage applied for permission to put in corroborative evidence a statement that Singampatti had made to the police shortly after the murder. He wanted to do this in view of the allegations that the approver's statement was prepared, by the pleader. Permission sought for was under S. 155. He knew that objection would be taken by the defence under S. 25 of the Evidence Act but that did not apply in the present instance. When Singampatti made the statement he wanted to put to the police he was not an accused person. It was not a confession by an accused person to the police sought to be used against an accused person himself. Singampatti was not an accused person and evidence was not proposed to be used against him.

Mr. Wadia objected to the statement going in. He submitted that Singampatti had only been given conditional pardon and if afterwards he turned out to be accused, it would be creating a strange anomaly. The very reason why they came to the Bombay High Court was because of certain Police methods in connection with this case. After some further discussion, his Lordship held the statement admissible.

Re-examined by Mr. Weldon, Singampatti said he knew Jagadesa Iyer, Assistant Commissioner of Police. He had made a statement to that officer on the early morning after murder. He must have stated to that officer what he had told in Court. He did tell the police officer who committed the murder.

In reply to questions suggested on behalf of some jurors by the foreman, witness said before 15th October there was not any general talk among wards about any wrong done by De la Hey. The evening of the 15th October was the first occasion he heard conversation about De la Hey.

Mr. Jagadesa Iyer, Assistant Commissioner of Police and the clerk of the Court of Wards then gave evidence.

*Junior Urkad.*

Junior Urkad, a lad aged 12, was the next witness. The boy appeared in the box smartly dressed and in reply to Mr. Weldon expressed inability to give evidence in English and declared he was not all nervous. In examination-in-chief witness corroborated the approver's statement in the main details.

Mr. Wadia, in rising to cross-examine, at the outset produced a letter alleged to have been written by Urkad Senior. Contents of the letter were not revealed, Mr. Wadia saying he would do that when Urkad Senior came into the box. The witness identified the signature in the letter as that of his brother.

Questioned by Mr. Wadia witness said Singampatti was a bold boy and a good shot. Witness used to go out shooting sometimes. Singampatti knew all about guns. Witness came to Newington in December 1918. He could not shoot.

Mr. Wadia : You can't even lift a gun I suppose ?



Continuing, witness said guns were always kept in Kadambur's room. All boys with the exception of himself could use guns and cartridges. He had a sister named Dorachi. He didn't know if Singampatti always told Senior Urkad he wanted to marry her. He understood what Kadambur suggested was horrible. He didn't tell them so. He simply wanted to know what the conversation was about. Singampatti made no objection at all to Kadambur's proposal for shooting De la Hey. Some time before the murder all wards had gone to Ooty where Berekai and Talavancote got into some trouble over a woman. Kadambur had reported their conduct in this connection to Mr. Morrison and as a result the Principal had ordered them never to leave the compound during their stay at Ootacamund. Kadambur at one time wanted to marry his sister. Witness was fond of De la Hey. Asked why then he didn't report the plan to shoot him, witness said Kadambur was with him the whole of the time. Kadambur did not actually prevent him from reporting, but he was guarding him. He tried to escape, but didn't succeed. When the Commissioner of Police arrived, he asked him if he knew anything. Witness first answered in the negative. Everyone said no. No police officer had told him if he didn't give evidence his estate would be taken away.

*Talavancote.*

Ward Talavancote, aged 13, was next examined. Questioned by Mr. Weldon he deposed to having overheard the conversations that passed between the accused and Singampatti about shooting De la Hey. He went and reported what he had heard to Berekai and Chundi because they were both his friends. He told them to warn De la Hey. They didn't believe his story.

Cross-examined by Mr. Wadia, witness said he had procured a grass cutting woman for Berekai at Ooty. The husband of that woman did not thrash him and Berekai, but their conduct was reported to the Station-master. The accused repoted to Mr. Morrison. As a result witness and Berekai were prevented from leaving the compound of the house they were staying in at Ootacamund. Witness claimed he was the adopted son of the late Talavancote. He knew there was litigation in that connection, but he did not know any details. Asked if he was not the champion liar of Newington, witness said: Not so much. He did not know if the two sisters of accused were widows of Talavancote. He did not inform De la Hey about the conspiracy to shoot him as De la Hey would not believe him. He told lies in fun (*Laughter*). His uncle who was acting a servant at Newington left the college shortly before the murder. Kadambur was never punished by De la Hey. He did not notice any instance of unpleasantness between De la Hey and accused. Continuing, witness said since he came to Bombay, Jagadeswara Iyer had not seen and talked to him. He did not remember the hour when he saw Kadambur taking up the gun in the night. His recollection was he saw only one gun being carried up but he did not remember.

Q. I put it to you, you saw nothing and are merely drawing on your imagination. A. I did see. I forget now.

Proceeding, witness said nobody had told him to say all these things in Court. He knew Dorachi, Senior Urkad's sister. He was staying in the same house with her but separately. He knew Singampatti would always be speaking to Senior Urkad. Witness did not remember if Urkad Senior got angry with Kadambur because the latter spread statements about the



character of Dorachi. He did not know if accused said anything about the character of Dorachi. He did not remember having said anything against Dorachi himself. He did not know for a fact whether accused said anything in Urkad's presence about Dorachi's character which annoyed Urkad. He did not remember if Senior Urkad quarrelled with accused because of this. At one time accused wanted to marry Dorachi. Witness did not know the match was broken off because accused refused to marry her. Kadambur and Senior Urkad were good friends at one time and witness thought the girl might be given in marriage to Kadambur.

Q. Did you make a report to accused about Dorachi ?

A. I don't remember.

Q. Try to remember.

A. If I say anything I don't keep it in memory. (*Lugther*).

Continuing, witness said he knew Anamalayan. But he did not remember what he had said in connection between him and Dorachi. He did not remember whether the Police Commissioner questioned him shortly after the murder. Witness was a Tamilian and Singampatti a Telugu. And still Singampatti dined with witness in his mess. This was not because of the quarrel with accused. Accused got witness's uncle dismissed from the school.

#### *Urkad Senior.*

Senior Urkad aged seventeen was the next witness. Examined by Mr. Sydney Smith, he corroborated the prosecution story. Although aware of the plot to shoot De la Hey, he did not inform De la Hey because Kadambur had threatened to shoot him.

Cross-examined by Mr. Wadia witness said he knew Mrs. De la Hey and could go to her frequently. He did not send word and warn her because he was frightened of Kadambur shooting him. Witness and his brother knew about the preparations to shoot De la Hey but he did not know Talavancote knew. Kadambur had said, "We are going to shoot De la Hey. He did not care to know what was meant by "We." After the occurrence, he learnt what "We" meant.

Q. Do you mean to say you realised De la Hey was going to be shot and still you did not tell anybody about it ?

A. I was only partly sure and partly not sure and I was frightened by Kadambur. He had told me he would shoot me.

Q. I put it to you, if there was a conspiracy to murder De la Hey, you were in it. Were you not ? A. No.

Q. Then why did you keep silent ? A. I was afraid.

Q. You and Kadambur were inimical ? A. I don't understand.

Q. Are you not on unfriendly terms with him ?

A. I was neither friendly nor unfriendly with Kadambur.

Mr. Wadia at this stage handed over to witness a letter alleged to contain his initials and which was identified by Junior Urkad yesterday to contain his initials. Witness said the initials in the letter were not his. Pressed further by Mr. Wadia, witness gave the same reply, am not sure.

Q. Now read and tell me whether you received that letter.

A. (*After persual*). I don't know if I received this letter.

Q. Remember, you are on your oath. A. Yes.

Q. Now tell me whether you did not write on the back of it "Right you are." A. I don't remember if I wrote that.

His Lordship at this stage enquired what was the letter about.

Mr. Wadia. My Lord, our case is that this witness was in the habit of committing unnatural offence on boys. The accused Kadambur wrote to this boy reproving him for his conduct and asking him to desist. The witness returned the letter with the endorsement, "Right you are" and his initials on the back. When the accused was arrested his papers were allowed to be taken away by his legal advisers. And his letter was among them. I merely want to prove that the relations between this witness and the accused were not friendly.

Q. You have been in the habit of committing unnatural offence?

A. I don't understand you.

Q. You understand it perfectly well. Come along, answer the question. A. I don't understand.

Q. Very well, you know a boy named... (Mr. Wadia mentioned a name). A. Yes.

Q. You were in the habit of writing love letters to him? You used to write to him 'my darling'? A. No.

Q. You had improper relations with him. A. I don't understand.

Q. (To the interpreter). Please translate it to the witness in Tamil.

The question was translated. At this stage Mr. Weldon got up and applied for protection to the witness under the Evidence Act. If his Lordship thought it necessary, he was bound to answer the question. But at the same time witness must be assured that any admission of guilt would not be used against him. Mr. Wadia said he had no objection being given. Protection sought was given.

Q. Now then, answer the question. No harm would come to you. Did you not have improper relations with this boy? A. Yes.

Q. Also with two other boys? (names given). A. Yes.

Q. Now say if that writing and initials are yours.

A. I don't know.

Mr. Wadia next proposed that witness should write out his initials and it must be left to jurymen to conclude whether the initials in the letter were that of witness. This was not allowed.

Q. On account of this malpractise of yours, you and accused had a quarrel? A. No.

Q. You have a sister called Dorachi? A. Yes.

Q. At one time it was intended accused should marry her?

A. I don't know.

Q. You don't know anything about your sister's marriage?

A. I don't know anything about the marriage affairs of my sister.

Q. Accused told you your sister had bad character? A. No.

Q. And you quarrelled with the accused over that? A. No.

## CROSS-EXAMINATION

Q. You had no reason to fear Kadambur before 15th October ? A. No.

Q. No-body had contemplated before the date to murder De la Hey?

A. Not that I know.

Q. You know Raja of Ramnad ? A. Yes.

Q. He is a relation of yours ? A. Yes.

Q. He greatly disliked De la Hey ? A. I don't know that

Q. De la Hey never called him in your presence Negro seething with sedition ? A. No.

Q. You have never heard that before ? A. No.

Continuing, witness said he knew something about proposals connected with the opening of Rajkumar College. If that had been opened, Newington would have been closed. He read newspapers but he did not remember to have read discussion about the Principalship of the College

Q. I put it to you, Singampatti and you arranged that De la Hey should be shot. A. No.

Witness proceeding said he was not particularly friendly with Singampatti. They were relatives, both their estates were adjoining one another. He did not go down after Mrs. De la Hey shrieked. He did not know if Singampatti went down.

At this stage, the foreman of the Jury drew the attention of his Lordship to the fact that Singampatti's father, who had been asked to leave the Court when Singampatti was giving evidence, at the request of the defence was standing at other end of his Lordship's dias facing witness. Mr. Wadia also almost simultaneously drew attention to this fact and asked that Singampatti's father should be dealt with. His Lordship ordered him to leave the Court and to Mr. Wadia's request that he should be dealt with, said it might be that Singampatti's father thought that the order applied only so long as his son was giving evidence.

Q. You two boys, you and Singampatti had not the courage to go down when Mr. De la Hey shrieked because you were the real culprits? A. That is not so.

Q. Is it a fact all of you boys have not been allowed to see your relatives ever since this murder ? A. I saw my relatives.

Q. Others. A. I don't know.

Q. Is it not a fact you are not allowed to go out alone ? A. Yes.

Q. On the evening of 15th, why did you want to open the bath-room in which it is alleged Singampatti and Kadambur were closeted ; what did you suspect ? A. I did not suspect anything.

Q. I put it to you your brother and Singampatti were all in this affair. A. No.

Q. Then, can you explain your conduct why you kept silent ? A. No.

His Lordship. Why did you go into Kadambur's room at all ? A. For nothing in particular.

Proceeding, witness said he never went out shooting because he was frightened, He never accompanied the shooting party.

Q. You ride, don't you ? A. Yes.

Q. You sing? A. Yes.

Q. You dance? A. No.

Q. Did you ask Kadambur why he was going to shoot De la Hey?

No.

Q. Tell us the truth about the murder. Who did it?

A. I don't know.

Q. Is it true you told at the inquest—I know of no reason why Kadambur should have shot De la Hey? A. Yes.

#### Berekai

Minor Zemindar of Berekai aged eighteen was the next witness examined by Mr. Sydney Smith. He said that on the evening preceding the murder while he and minor Chundi were seated in their room, Talavancote came up to them and said Kadambur was proposing to shoot De la Hey. This was at about seven o'clock. He did not believe it and therefore did nothing. Later on Talavancote again came up and said Kadambur was taking cartridges. Talavancote asked him to go up and warn De la Hey. He did not do that because he did not believe Talavancote. Shortly after he went to bed at about 12-30. He heard the report of a gun shot. He was then lying awake, his sleep having been disturbed two minutes previously by mosquito net. As soon as he heard the report he sat upon his bed. He was still sitting when Kadambur and Singampatti passed and came up. He did not notice anything with Singampatti. Kadambur threw away the gun near the urinal. He went down when Mrs. De la Hey shrieked. She asked him who had shot and Kadambur then mentioned the names of Kadambur and Singampatti. Mrs. De la Hey asked him to phone to Major Hingston, which he did. Subsequently he phoned to the Commissioner of Police at the instance of Mrs. De la Hey. When Major Hingston arrived after examining he asked witness who did it and witness returned the same answer he gave to Mrs. De la Hey. Thereupon Mr. Hingston asked him to write it down on a piece of paper, which he did. Mr. Sydney Smith at this stage produced the piece of paper and asked whether writing in it was the writing referred to. Witness said it did not look as if it was his handwriting. The guns were common property of all wards. Cartridges were Kadambur's property. He went out shooting only once and on that occasion he went with Singampatti, Kadambur and Saptur.

#### Cross-examined.

Q. You are known by the nickname of fat-heated goose?

A. Sometimes (Laughter).

Q. It was given to you by the accused? A. I don't remember.

Q. I put it to you it was accused who gave you that name and that you were angry with him? A. I was angry with him only for a day or two. We are all boys.

Q. We know you are all boys (Laughter).

Continuing, witness said he remembered the time when Talavancote got him a grass-cutting woman at Ooty. Accused reported this to the principal and as a result he and Talavancote were ordered not to leave the compound. It was not true since then he did not speak to the accused. Since that day he was not on inimical terms with the accused. This incident made no difference in their relations. Witness had a cook. Accused in his capacity at Mess Secretary got him dismissed. Witness did not care for this, as the dismissed man was after all a servant. It was not true all these put together made him very cold towards the accused. Witness did not believe Talavancote as he used to tell lies. I did not strike him as strange and extraordinary.

Q You wear glasses ; don't you ? A. Yes.

Q. Why have you left it off ?

A. Doctor advised me to wear glasses only for 3 years.

Q. On the night of murder, you had glasses on ? A. No.

Q. If Mrs. De la Hey says you went down that night in response to her shrieks with glasses on ? A. I had not put on glasses.

Q. Who was the doctor that advised you to wear glasses for three years ? A. Col. Kirkpatrick.

Q. When did he advise you ? A. Some time in 1916.

Q. You were wearing glasses in the train from Madras to Bombay ; were you not ?

Witness was slow in replying.

Q. Come along. Look at me. I am not so bad looking. (Laughter).

A. Yes. For a little while.

Q. You have deliberately removed your glasses here so that your eyesight was not to be questioned ? A. No.

Q. On the night of murder you were sleeping with your mosquito curtain tucked in. A. Yes.

Q. It was black with dirt ? A. Yes

Q. It was a dark night ? A. It was moonlit night.

Q. Well it ? A. Medium moonlit night.

Q. There was very heavy rain after the murder ? A. Yes.

Q. You were trying to make out that cartridges were the private property of accused. Did you see him buy them ? A. No.

Q. Did you see him order them or anybody bringing it to him ? A. No.

Q. Did he tell you so ? A. No.

Q. It is not because that you want to get him convicted that you are doing all this ? A. No.

Q. After all you say you saw Kadambur coming up with a gun before he threw it down, did you see him do anything ? A. No.

Q. I will put it to you more plainly. Did you see him attempt to commit suicide ? A. No.

Q. Did you question Kadambur and Singampatti when they came up ? A. I was frightened and so I did not.

Chundi

Minor Zemindar of Chundi was then briefly examined by Mr. Weldon. Cross-examined by Mr. Wadia, Chundi admitted that Mr. Yates, when he was Principal of Newington, had punished him for stealing soap, scent, cash and sundries belonging to Arni Minor, then ward at Newington. He denied Kadambur reported him to Mr. Yates and said Kallicote did it. Minor Peddamarangi was also punished together with Chundi for similar offence. On the night of the occurrence Chundi said he got up on hearing noise of gunshot. He was usually a heavy sleeper. On waking up he saw Kadambur going upstairs with a gun in his hand. Kadambur did not have the gun when

he passed his bed. He did not see Singampatti at that time. Pressed by Mr. Wadia, witness said he did not remember if he mentioned about seeing gun in Kadambur's hand to the Police or Magistrate. If Singampatti has said he ran upstairs after the shot was fired closely followed by Kadambur, witness could not explain how he failed to see Singampatti. All he could say was that he saw Kadambur above and that he did not see Singampatti.

Q. I put it to you that you did not see Kadambur and that you are deliberately making a false statement to bring the accused into trouble. A. No I really saw Kadambur.

At this stage, his Lordship enquired what Mr. Wadia suggested about the time the conspiracy to involve accused into trouble started. Mr. Wadia said Urkad, Chundi and others must have conspired to involve Kadambur about the time of murder. He could not say whether it was resolved upon before or after the murder.

Replying to Mr. Wadia, Chundi said he went down on hearing Mrs. De la Hey's shrieks before the Major Hingston arrived. Mrs. De la Hey was then saying. "Who could have done it", many times, but he did not tell her that Kadambur had done it. Though he heard Kadambur say in the evening he was going to shoot De la Hey, he did not tell Mr. De la Hey about it as accused was in the habit of telling lies and witness did not take accused's words seriously. He could not say why Kadambur should have shot De la Hey.

Re-examined by Mr. Weldon, witness said his income amounted to forty thousand rupees per annum. He, Kadambur and other minors were upstairs between the time Mr. Armitage, Police Commissioner came and Jagadeswara Iyer, Assistant Commissioner of Police, took his statement.

Replying to his Lordship's questions, Chundi said when he said he saw Kadambur he did not mean he saw his features. He only saw curly hairs of the person. Then he saw and also noticed that the person was tall.

His Lordship. Then you didn't see the accused or his features?

Witness. No I only noticed a person. I saw he had curly hairs and was tall. Excepting these two facts I noticed, I didn't see anything more. From the two I made out that the person I saw should be Kadambur as he has curly hairs and is the tallest of us all.

His Lordship (To Mr. Wadia); Has accused got curly hair and is he the tallest of all?

Mr. Wadia. No, my Lord, Singampatti has.

Prosecution next tendered other witnesses for cross-examination:— Minor Peddamarangi and Doraiswamy, Peon of Newington. Replying to Mr. Wadia, Peddamarangi said he knew nothing of talk between Kadambur and minors about shooting De la Hey. He was in his room studying.

Mr. M. K. Rangaswamy Iyengar, teacher at Newington, said he was teacher at Newington for about eighteen months. He knew Kadambur well in February 1919. Then Kadambur and Saptur were appearing for Matriculation Examination. Both Kadambur and Saptur struck work and did not do their class lessons properly. Mr. Morrison was then Principal. Here Mr. Wadia pointed out any incident in Mr. Morrison's time was not relevant. His Lordships upheld the objection; for witness then said he came to know from conversation of wards that De la Hey was responsible for Kadambur and Saptur striking work in January last. His Lordship

## CROSS-EXAMINATION

disallowed the statements as witness said he could not say which ward told him about the incident. Witness said he thought on 15th October the day before the occurrence, Kadambur showed himself absent minded in his class.

Cross-examined by Mr. Wadia, Rangaswamy Iyengar said he believed he was suspected and dogged by police in connection with De Hey's murder.

Mr. Wadia. I put it you, the Police dogged your steps continuously.

Witness. I cannot say that I inferred I was suspected by the police one time.

His Lordship. When the Police watch a suspected party he is not expected to know (laughter).

Continuing, witness said he thought Police did not treat him with the respect due to him (laughter). Mr. De la Hey had given witness one month's notice to leave Newington, but the Court of Wards, after the murder, increased the period of notice to three months. Asked to explain what he meant by saying Kadambur and Saptur struck work in January last, witness said that Kadambur and Saptur attended his class but did not show enthusiasm in their work. They seemed to be half-hearted in doing their lessons. Asked how he came to know Mr. De la Hey called Kadambur as barbarous Tamilian, witness said he had heard the wards mentioning it.

Mr. Wadia. You learned from them, overheard conversation between wards (laughter.)

Witness. No. One ward told me later.

Mr. Wadia. Who is he?

Witness. I don't remember. Mr. De la Hey had not punished accused at any time.

Q. Kadambur was one of your diligent and excellent students?

A. I don't use adjectives. I will say Kadambur was a good student. It is true he is one of those few students that took any interest in studies at all.

Replying to further questions witness said Kadambur's room on the ground floor was used by many pupils and teachers as common room for keeping sporting things. He thought Senior Urkad and Kadambur were friends. He knew Urkad was a relation of the Raja of Ramnad. He had also heard that the Raja of Ramnad amongst others was opposed to the appointment of the late Mr. De la Hey to the Principalship of Rajkumar College. Talavancote came to Newington in January 1919. Witness said he was not aware if the term barbarous Tamilian was not used by Mr. De la Hey with reference to Talavancote and became a fun with boys and was not taken by them as an offence. Kadambur was the favourite pupil of Mr. Morrison, Ex-Principal. Mr. Morrison supported Kadambur's request to be taught Science and Sanskrit, and witness had taught accused Sanskrit for three months at Ootacamund and had to give up teaching Sanskrit later owing to pressure of work.

Re-examined by Mr. Weldon, Mr. Rangaswamy Iyengar said Kadambur was not Mr. De la Hey's favourite pupil.

His Lordship. Masters are not supposed to have any favourite pupils. They are supposed to be impartial towards all.

Replying to Mr. Weldon, witness said he thought he was suspected of being partial towards the accused and not giving full information. After he had given evidence at the inquest, the Court of Wards asked him not to go to Newington premises at all, and he had an appointment order sent to him on 17th October by the Director of Public Instruction, cancelled the next day. Mr. De la Hey was not in favour of Kadambur learning Sanskrit.

Replying to his Lordship witness said he did not think Mr. De la Hey's refusal to support accused's request to learn Sanskrit was any serious matter.

#### *Saptur*

Young Zemindar of Saptur was the next witness called by the prosecution and tendered for cross-examination.

Replying to Mr. Wadia, witness said: I have curly hair. I am a tall boy amongst the wards. But Kadambur is the tallest of us. He is taller than me by two or three inches. He did not know of the existence of any ill-feeling between accused and Mr. De la Hey. Singampatti was the best shot of all the wards at Newington. Senior Urkad did not accompany their shooting expeditions. On hearing Mrs. De la Hey's shrieks Berekai and another ward went down. He had gone down before Major Hingston had arrived on the scene. Urkad Senior and Junior and Singampatti remained upstairs and did not go downstairs. Accused had told witness that Senior Urkad's sister Dorachi's character was not good. Accused had first promised to marry Dorachi but later broke off the arrangement owing to her character. Kadambur was an outspoken man and the poorest of the wards. Singampatti was richer than Kadambur. His own estate was worth one lakh. It had no debts. Chundi's estate had debts. He could not say Chundi's estate's debts were such as to leave only a pittance for Chundi's mother's maintenance. Kadambur was a good student and was well posted in his studies. Continuing, witness said as soon as he went down with Kadambur Mrs. De la Hey asked them to go upstairs and they went up again. He was downstairs in the billiard hall on the evening before the occurrence and did not notice anything unusual. There was no feeling on De la Hey's disallowing Sanskrit. Before the murder he had thought Urkad Senior was Kadambur's friend. Accused was an outspoken man and used to advise. People did not relish advice generally and other wards whom Kadambur used to advise did not like it. Accused had told witness Senior Urkad, Senior Arni and Kallikote had no character. He thought Berekai and Talavancote were inimical to accused. He saw Singampatti on the evening before the occurrence and did not notice anything unusual about him. Singampatti was not nervous on that evening. Singampatti was not a nervous man. He was the best shot amongst them and nervousness was dangerous in shooting. Accused's hands were shaky whenever they held anything. Cartridges and guns were not Kadambur's or any boy's property. They were intended for all wards. Cartridges were kept wherever the boys liked. He himself had thrown cartridges in an open drawer. They first went out for shooting on Dusserah day at the end of September and Singampatti showed himself the best shot at a first shooting expedition. The night of the murder was very dark and it was impossible for anyone to recognise faces that night. Asked if Kadambur used to lock his rooms, witness said students were not to lock their rooms.

Re-examined by Mr. T. R. Weldon, witness said he was playing gramophone in the billiard hall on the evening before the occurrence



and did not pay much attention as to who all were coming or what they were doing.

Replying to His Lordship witness said he, Kadambur and another minor were upstairs talking for nearly half an hour before going down and again came up shortly upstairs as Mrs. De la Hey asked them to go upstairs.

The Foreman of the Jury requested permission to ask witness to say what was the talk between witness and accused before they went down and what they again talked after coming up.

His Lordship remarked that he purposely had not asked this question so as to avoid any prejudice arising to the accused. His Lordship enquired of Mr. Wadia if he had any objection. Mr. Wadia said he had no objection. His Lordship thought the question was necessary. While he did not want to have his client's case prejudiced, he did not want to stand in the way of truth coming out. After further consideration, Mr. Wadia said he would consult the accused and after a brief consultation, said the accused had no objection to the question being put to the witness.

Replying witness said that before going down as they had only heard Mrs. De la Hey's shrieks and no gunshot, they were discussing as to what could have happened. Later they learned from Berekai's shouting in telephone that De la Hey had been shot. After coming up they were talking excitedly as to who could have done it.

#### *Mrs. De la Hey's Statement*

On behalf of the prosecution Mr. Weldon then put in Mrs. De la Hey's statement before the Lower Court, she herself having gone to England together with Miss De la Hey after the occurrence. Mr. Wadia made no objection to Mrs. De la Hey's statement going in. In her statement Mrs. De la Hey said on the night of the occurrence she was awakened about midnight by a terrific noise and found her husband dead. Major Hingsford came and minors Berekai, Chundi, Kadambur, Singampatti came down. She could swear she saw Singampatti, downstairs. She thought Singampatti was dressed up to the neck, but she could not swear. Kadambur had only his dhoty on. Singampatti looked nervous and fidgetty while Kadambur continued staring at her silently. She later heard Berekai had said Singampatti and Kadambur did the murder. Her husband was not favourably disposed towards Kadambur.

#### *Miss De la Hey's Statement*

Mr. Weldon next sought permission to file Miss De la Hey's statement before the Lower Court in which she had said she drafted adverse report about Kadambur to the Court of Wards.

Mr. Wadia objected saying if the original report was inadmissible as accused's knowledge of its contents could not be proved, the draft report also was inadmissible. The report only showed deceased's state of mind towards the accused and not of the accused towards the deceased.

Mr. Weldon submitted that the report would show when Mr. De la Hey used the terms barbarous Tamilian, he intended Kadambur, and not Talavancote, as defence wanted to show; it would also prove feelings between accused and deceased were strained and the report together with Miss De la Hey's statement was admissible under Sections 8 and 14 of the Evidence Act which allowed relevant documents to be admitted.

Mr. Wadia submitted that under Sections 9 and 33 alone could any statement be held admissible as evidence and for that it should be shown that accused was aware of the contents of the report. Prosecution had failed to do it an even to hint at it. He did not say report was not relevant but his submission was it was not admissible as what was needed was to prove motive of accused for murder and not prove motive of deceased. His Lordship ruled the draft report of Mr. De la Hey to the Court of Wards about Kadambur was not admissible as evidence unless the prosecution could prove the accused knew its contents.

This closed the prosecution case and accused said he had nothing to add to his statement before the committing Magistrate in which he had said he did not shoot De la Hey and that witnesses spoke on account of enmity towards him. Mr. Wadia said he did not wish to lead defence evidence.

#### *Prosecution Address*

On the Court re-assembling on the next day at the outset His Lordship enquired whether there was no evidence that the glass pane in Kadambur's bath-room has been broken. Mr. Weldon pointed out that there was evidence of the two minors.

His Lordship enquired if there was Police evidence.

Mr. Weldon replied in the negative.

His Lordship having examined some photographs and plan and having further heard Mr. Weldon and Mr. Wadia, the foreman of the Jury inquired whether any attempt had been made to find out finger prints on the gun with which De la Hey is alleged to have been murdered.

Mr. Weldon. No attempt was made.

Mr. Wadia. The police were guarding the gun.

Mr. Weldon. True, but the gun was handled by many and unfortunately no attempt was made to trace finger prints.

Before Mr. Weldon began addressing the Jury his Lordship told Mr. Wadia that in view of the exceptional circumstances of the case, he could have the prisoner seated near him. Kadambur was then brought from the dock and offered a seat between Mr. Wadia and Dr. Swaminathan. All other wards of Newington who were witnesses in the case, were seated in a row immediately behind the seats occupied by Counsel conducting the case.

Mr. Weldon then addressing the Jury said that as they had heard the evidence he did not propose to take them into details. It was for the jury to decide whether they believed the prosecution evidence or not. One point was clear beyond all doubt and that was that on the night of 15th October or in the early hours of the 16th, Mr. De la Hey was murdered. It was not a case of suicide. He was shot through by a twelve bore gun. They had therefore to decide who was the man or who were the people concerned in firing that shot. The main evidence for the Crown rested on the school-boys. What had been the defence? They had to gather that not from positive evidence but from cross-examination. The defence had contented themselves by throwing an immense amount of mud on all in the hope that it would stick and that the murder charge against the accused would fail. Who were the witnesses? School-boys—eight in all. Of these Saptur and Peddamarangai had nothing to do with the affair. They had other six witnesses and their evidence taken *en masse* amply justified the accused's conviction for murder. The defence having no defence at all threw mud. What was the idea? The idea

was to establish two things, namely ill-will against the accused and the existence of a conspiracy. As regards ill-will, the defence were attempting to show that it was of such a character that the school-boys were prepared to swear away the life of one of their fellows. As to conspiracy, when did it start? He did not think defence would be able to give an answer. Starting from the evening of 15th October—and there was not a single hint of conspiracy before 7-30 that evening—what evidence had the jury of the conspiracy? If there was a conspiracy at all, it must be to do so something. If there was a conspiracy at 7-30 that evening it must have been with a view to get rid of a wholly innocent man not from the school but to get rid of his life. As reasonable men the jury ought to put that suggestion out entirely. What was the alternative? That six boys in that school having no grudge against De la Hey conspired to kill him and to fasten the whole blame on Kadambur? Could they, Mr. Weldon asked the jury, as reasonable men believe that school-boys were capable of that? They could not.

Coming to the next question, what was the reason why six boys wanted to get rid of Kadambur. The defence story was that Singampatti was anxious to marry Dorachi, Urkad's sister, and that as the accused was a rival, Singampatti had a grudge against the accused. Did the jury really believe that five other boys were going to join Singampatti to get Kadambur into trouble in order that he might marry Dorachi?

It was suggested by a question in cross-examination that Kadambur had declined to marry Dorachi. In other words, it meant that Singampatti had a walk-over, and his rival was gone. The jury would see the absurdity of the defence story. As he went along he had disposed the point so far as Singampatti was concerned. As to the rest, according to the defence, Bereka owed a grudge because of that little affair at Ootacamund over a grass-cutting woman, Chundi, a boy with an annual income of forty thousand rupees, because the accused reported him for theft of a scent bottle, Urkad Senior because he took a friendly interest in the accused and wrote to him a letter, Talavancote was brought in because he was the biggest liar and would mess things up, Junior Urkad had nothing to do. As a result of this conspiracy the chief conspirator Singampatti was arrested. And his fellow conspirators cheerfully tied their cord round Singampatti's neck. Could that be believed? Not one of them had seen the actual shooting. That was very amazing. If there was a conspiracy, two or three of the conspirators would have taken care to see the shooting. If, as the defence alleged there was a conspiracy, it was an extraordinary question where they met. They had good evidence that there was no meeting at all and it was impossible for the jury as reasonable men to believe that there could have been any conspiracy at seven-thirty that evening. Then there was the suggestion of conspiracy after the murder. Defence had admitted that there were two people in the murder and according to them it was Singampatti and Senior Urkad. What actual motive could Urkad have had to commit the crime? None whatever. Urkad had never handled a gun in his life and according to evidence he was gun shy. Assuming Urkad was one of the criminals, the fact remained that the man who fired threw the gun near the chamber pot. Could Urkad have gone out of his way, right round Singampatti's bed, thrown it over and then gone back? That was absolutely unthinkable. It was suggested that there was a conspiracy after the murder. When could it have started. Between twelve-thirty and two-thirty at night? Counsel asked the jury to picture in their minds this state of things at Newington at that time with a man lying shot dead, with a woman shrieking and boys frightened out. Was that the time when six school boys could sit together to hatch a conspiracy? Certainly

not. Minor Urkad was at that time lying asleep in a bed and was woke up only by the police. Senior Urkad was on his cot. Saptur, Padamarangi and accused were standing together and talking and eventually came down. Singampatti was lying on his cot. Berekai was telephoning to Doctor and the Police. All these put together knocked on the head of the idea of any conspiracy at that time. Did they believe that Kadambur as the biggest boy would not have heard of that conspiracy if really there was one and who promptly put an end to it? Further, the Police came on the scene very early. The Commissioner was there by one-thirty and the Assistant Commissioner had been taking down statements of boys. Was it possible to hatch a conspiracy then? The Police had no interest in running in X instead of Y. Counsel submitted that a conspiracy went clean out of the case and that they were left with actual evidence.

Who was the other criminal? They knew there was one boy in it, approver Singampatti. The Jury had to be satisfied that the approver told the correct story. In order to say that Kadambur shot De la Hey it required no conspiracy whatever. Singampatti, counsel submitted, had told the whole story. He was corroborated by the finding of two guns. The jury had to consider when was the first information given by Singampatti. He had given his statement that very morning. He was supported by the Junior Urkad who had no earthly reason whatever to give wrong information. Still more, Junior Urkad had implicated Singampatti too. As regards Talavancote he had been branded before them as a liar. Even liars could sometimes speak the truth and he was going to show that this arch liar had been corroborated in very important details. He had told that he saw some one cleaning the gun, some one carrying cartridges and mentioned names. He was corroborated beyond all doubt by the death of De la Hey.

People like Talavancote were sometimes capable of telling the truth and he had been corroborated. Taking Urkads both Junior and Senior they had corroborated Singampatti's story. The jury must remember that Junior Urkad was present when guns were cleaned by accused and Singampatti. Urkad bore no ill-will to Kadambur at all. That letter from Kadambur to Urkad merely contained a little friendly advice. As regards Berekai the defence had been at great pains to show that he could not see from his bed that night the person who asked him. This was not a case of people in a dark house trying to recognise an outside criminal. This was a case where Berekai had familiarised himself with the identity of the accused from top to bottom. The defence had suggested that Berekai had short sight but did they dare to put that suggestion to test? They did not. As regards Chundi, his evidence had corroborated beyond doubt that of the approver.

Another important circumstance he wanted to mention was what happened immediately after the murder. Singampatti badly frightened bolted. He suddenly discovered that he had the gun in his hand. What did he do?

He hurled it over the verandah and then went to bed and did not leave it to Kadambur. His bed was inside. He fired the shot, saw the accomplice bolting and followed him. He rushed past and threw the gun at a convenient place near the urinal. The gun near that urinal was certainly not the gun which was with Singampatti. Counsel submitted that Singampatti was telling the truth.

As regards the rest of the evidence the defence had thrown any amount of mud but their foundation was missing and they had adduced no evidence that there was a conspiracy. What did the accused himself say in his defence? He had nothing to add to the statement given in the Court below that he did not shoot De la Hey and that the witnesses spoke against him because they were made to say so by his enemies. Counsel enquired who were these enemies. Not one of them had appeared and there had never been any suggestion as to who they were from the beginning to the end.

As regards the letters exchanged in jail between the accused and the approver, counsel maintained it was clear there was somebody behind it. Unfortunately it did not occur to the police to examine the finger marks on the gun when it was discovered. The prosecution regretted that point but it could not be helped. The murder of De la Hey was a perfectly monstrous and heartless crime and if they believed the prosecution story, the jury should bring in a verdict of murder against the accused.

#### *Defence Address*

Mr. Wadia then addressed the jury on behalf of the accused. He said it was impossible to convict the accused not only of murder but of any offence. He could not understand why Mr. Weldon for the prosecution laid emphasis on the fact the late De la Hey had not committed suicide but was murdered. The defence had never disputed the late De la Hey was murdered, nor that it was a brutal, cowardly and dastardly murder. But it was neither argument nor justice to say that because the murder was admitted, somebody should be hanged as murderer. He himself believed in the immutable laws of justice and was sure De la Hey's murder would be avenged, but there were no reason to foster the crime upon Kadambur. Mr. Weldon had laid stress on the point of law that the Crown was not bound to show the motive that actuated the accused to commit the crime. He was ready to admit the law did not impose such a duty on the prosecution. But the jury were there to take a commonsense view of the whole case and form their opinion on the questions of fact and as such they were entitled to ask the prosecution to prove to their satisfaction accused Kadambur had sufficient motive in committing the cold-blooded murder of De la Hey. Before being asked to give a verdict of guilty, he would also draw the attention of the Jury to the fundamental and accepted maxim of law; the accused person was always entitled to the benefit of doubt and it was better ninety-nine guilty persons should escape than one innocent person should suffer. That was the reason why the case has been transferred from the Madras High Court to the Bombay High Court. The transfer was made under section 527, Criminal Procedure Code, which laid down the Viceroy in Council could order the transfer in cases where it was required to promote the ends of justice. The thanks were due for this act of justice to the broadminded and liberal rule of Lord Willingdon and the Viceroy. He would remind the Jury the case had been transferred to promote the ends of justice and he relied on them to see justice was not miscarried. Mr. Weldon for the prosecution had laid great value upon the defence not having proved conspiracy between the witnesses to involve Kadambur in trouble, but certainly the defence was not bound to prove anything at all. It was the duty of the prosecution to bring the guilt home to the accused and if it had been done and the defence had not rebutted it the Jury would be justified in presuming guilt. But here no case had been made out at all and it was strange to ask the accused to prove conspiracy or

guilt of other persons. Accused owed no duty to anyone except himself to prove or make out any defence. The defence had in that case completely succeeded in showing beyond doubt that prosecution witnesses were unreliable. All criminal trials required the prosecution should stand by the strength of its case and not by the weakness of the defence and that specially in the case of a murder trial. No accused can be convicted on the probabilities of being guilty. As regards the prosecution witnesses, Mr. Weldon had said the defence only threw mud at the witnesses in the hope some would stick and considering the witnesses were school boys, the Jury should not be swayed by them. He absolutely repudiated the statement that he wanted to throw mud. That the prosecution witnesses were school boys was a strong reason why the Jury should hesitate before finding guilty any person on their evidence. Specially what kind of boys had they at Newington? With rare honourable exceptions as Saptur, others were no credit to any school and on the evidence of these boys the prosecution wanted Kadambur to be declared guilty and had put forth the plea for the boys that he wanted to throw mud. He was least in the habit of throwing mud at anybody. He was not rich or poor, old or young, but at the same time he owed a duty to his client who though innocent, stood charged with foul murder, and mud was a term applied to statements that were only insinuations and not accepted or proved facts. But in this case he had not put a single question affecting the boys which had not been admitted, he was eliciting truth, not mud-throwing. He was really sorry he had put a question relating to Dorachi, sister of Urkad, but he had no other course left in the discharge of his duties. He had on his shoulder the life and honour of an innocent and young man. Urkad Senior could have avoided reference to his sister, by answering his questions truthfully and frankly instead of persisting in his answers. Mr. Weldon had made much of the defence not having suggested a motive to the Police for the prosecution of Kadambur but it did not need his saying that the Madras Police had discredibly failed to do their duty. They had not done what suggested itself to laymen, as the Jury, namely, to examine the discovered gun for finger-prints which with the aid of science would have pointed to the real culprit. Mr. Weldon wanted them to believe as the gun should have been handled by many, nothing would have been gained, but the evidence before the Court went to show that the gun was kept untouched safely for a long time. What was it the police had done to find out the real culprit excepting doing what they could to father the guilt upon Kadambur whose name had been suggested to them. The murder had been committed and the murderer should be found, and finding Kadambur put forward as a culprit they began to concentrate their energies upon bringing home the guilt to him than to investigate for themselves. To take the most liberal view they had swallowed what they were told without verifying facts and troubling to find out the truth. Everybody knew the police were expected in such cases to get a conviction to keep up their repute. That was a sufficient motive to show why the police were not on the side of truth, but on the side of the approver. He was told a Madras jury would have convicted the accused. He could understand the gullibility of the Madras Police and the reason why Madras was called the benighted presidency. But he knew such stuff as the prosecution story would go down the throat of a Bombay jury. He would also point out the Police conduct was not above reproach. The Police Sub-Inspector when asked in the witness-box where Kadambur's keys were found was hesitating in stating the truth, the keys were on the table. Further, Mr. Jagadeswara Iyer, Assistant Commissioner of Police, who was the investigating officer did nothing of investigation.

## CROSS-EXAMINATION

They did not have Mr. Armitage, Police Commissioner, before them and the evidence went to show the minors did not mention Kadambur or Singampatti's names before Mr. Armitage and that it found a place in Jagadeswara Iyer's report. The Police story, in brief, was the gun and cartridges were kept in Kadambur's room. He was a favourite pupil of the Principal at Newington but not liked by De la Hey. He had been refused permission by the deceased to go to England or to learn Sanskrit and some months before the occurrence, it had been vaguely stated that De la Hey called the accused barbarous Tamilian. The motives attributed above were preposterous. Nobody would shoot the Principal for the phrase barbarous Tamilian used many months before the occurrence nor for not being taught Sanskrit or sent to England. It had been proved further that Kadambur was an outspoken man and a good student who advised other wards and was not liked for it. His room in the ground floor was used in common by teachers and pupils and cartridges were placed anywhere the boys liked. Saptur had stated, and the almirahs and drawers were not locked, or if locked, had their keys thrown open on the table for anybody to pick up. Kadambur was not using the ground floor room for sleeping and the gun and cartridges were common property. They had only Singampatti's evidence in the main to support the prosecution case. He had himself been accused till 24th October had heard all the evidence and at the last stage, his counsel had offered him as approver, and the statement, as Singampatti admitted in his letter to Kadambur, was prepared by his Vakil who was with him before he was called on to give evidence. Singampatti as approver who had been granted conditional pardon was interested in getting Kadambur convicted. He had carefully planned the statement to make himself appear an unwilling tool in the hands of Kadambur and not to incriminate himself; he had been cowardly in his attitude and told deliberate lies in the witness-box. He was the crack shot in Newington and still swore he never touched the gun till he came to Newington. The defence theory which he put forward for what it was worth was that Senior Urkad who could not shoot was an accomplice with Singampatti who must be the murderer. If Kadambur wanted to shoot he needed no help, he himself being a good shot; but Senior Urkad not being a good shot and owing a grudge to De la Hey for calling the Raja of Ramnad a Negro seething with sedition had the need of a helper to shoot and Singampatti should have been the culprit. When Mrs. De la Hey shrieked, Kadambur went down with Saptur and Padamarangi and stared at Mrs. De la Hey and, according to Saptur who, Mr. Wadia said, was one honest straightforward youth at Newington joined Saptur from the bed directly and was discussing who could have done and what had happened. Chundi and Bereka had said they recognised the person that came upstairs as a tail man with curly hairs. It was Singampatti alone who had curly hairs. His suggestion was Senior Urkad and Singampatti were concerned in the conspiracy to murder De la Hey, for had Kadambur been concerned, Junior Urkad would not have been taken into confidence. He put it that Kadambur's name had been substituted in the place of Senior Urkad's name. If Senior Urkad's name was placed in the place of Kadambur's, the prosecution story would be more consistent with the facts they had before them. What was Kadambur's behaviour after the murder? They had been told that the gun was thrown down from upstairs by Kadambur and police evidence was cartridges and gun instead of being scattered were near one another and the gun showed no signs of having been thrown from a great height. Mr. Weldon expected them to



ignore the escapades of the witnesses. For instance as regards Chundi who admitted being punished for stealing sundries, Mr. Weldon said Chundi had annual income of Rs. 40000. If Chundi with such large income stooped to steal sundries, it only showed how depraved his character was. With the exception of Saptur and Padmarangi the character of the other wards was no better. Talavankote was champion liar and he admitted he told lies for the fun of it. And, Mr. Weldon, while admitting the loose and prevaricating character of this boy, asked jury to believe for once the boy spoke truth in Court. That was a curious suggestion. As defence counsel he was not bound to put the guilt on others and he would have refrained from pointing to Singampatti and Senior Urkad as the probable culprits if they did not stand condemned by their own evidence. The evidence of identification by Chundi and Berekai that they saw Kadambur coming up should fall through by the evidence of Major Hingston and Saptur who had sworn the night of occurrence was dark and one could not see faces that night. Berekai, Chundi, Talavancote, Junior and Senior Urkad had uttered deliberate falsehoods in Court involving Kadambur. Excepting Junior Urkad, who was too young to discriminate between good and evil and was dependent on Senior Urkad, other witnesses had reason to bear ill-will to the accused. Mr. Wadia here analysed the evidence of each witness and dwelt on the discrepancies and contradictions between the statements of witnesses and especially in the case of Singampatti said they went to lay suspicion at the door of Singampatti and Senior Urkad. Mr. Wadia then drew the attention to Major Hingston's certificate to the accused about tremor of hands and in concluding paid a tribute to the jury and His Lordship for the assistance rendered in eliciting truth by their questions to witnesses and appealed to the jury to rise above caste and community and to give a verdict on the evidence before them fully realising the responsibility on them and the fact that the honour and life of a human being rested on their decision.

#### *His Lordship's Summing Up*

His Lordship, sir Norman Macleod, in summing up the case to the jury, touched at great length on the main features of the evidence. There was no doubt said his Lordship De la Hey was murdered. It was not an accident. Whoever fired that shot must have intended to kill De la Hey. The question the jury had to decide was whether the accused fired that shot or was present with the gun when some one else fired. The accused had called no evidence and was perfect by justified in asking the prosecution to prove the charge. The evidence for the prosecution was admittedly a puzzle. The jury must make up their minds whether they believed the approver or not. His story had been corroborated in many ways, not only in details of crime but in the personality. If the jury believed he was telling the truth it was sufficient corroborative evidence. Prosecution evidence had not disclosed everything that was going on at Newington between the boys and their Principal. As regards the question of motive, it has been suggested there was a certain amount of ill-feeling between Kadambur and De la Hey, but it was difficult to believe it was sufficient for inducing a murderous plot against the Principal. It is possible the term 'barbarous Tamilian' may have been used by the deceased with reference to Talavancote who as the jury might have noticed was different from the rest. As regards Singampatti's statement that he was afraid of Kadambur and so did not give information, there was nothing in it for securing protection from threats. Talavancote had badly broken down in cross-examination and not the slightest reliance should be placed on anything said by him. It was extremely doubtful if



Berekai could have known the identity of the person whom he saw running. Chundi's story about seeing a person coming up was also unlikely. As regards throwing mud in this case, Mr. Wadia was justified in asking questions because he got all he wanted. The point raised about the youth of the witnesses cut both ways. The standard of truth at Newington apparently was not very high. Talavancote had been described as the champion liar. They did not have champion liars unless there was competition. The approver wanted the jury to believe he was literally dragged in by the superior will of Kadambur. Supposing the prosecution story true it was more likely Singampatti took an equal part in the crime, rather than an unwilling one. His Lordship in conclusion directed the jury if they were satisfied with the prosecution story to bring in a verdict of guilty of murder; if they had any reasonable doubt, to give the benefit of that doubt to the accused. The jury returned an unanimous verdict of not guilty and the accused was acquitted.

## CHAPTER 76

### Of Actual Doer (Actor Rule)

A person's memory of what he did or did not do is generally presumed to be more trustworthy than that of a mere observer. Moore on Facts, Vol. II S. 705, p. 760

Cicero forcibly suggested this principle in the speech for Archias, the poet, when he told the Judges:—"There is a man present," said he, "a most scrupulous and truthful man, Lucius Lucullus, who will tell you not that he thinks it, but that he knows it; not that he has heard of it, but that he saw it; not even that he was present when it was done, but that he did it himself." The rationale of the *Actor Rule* is that the chances of error inherent in the testimony of an ordinary observer are almost entirely eliminated from his testimony, leaving it exposed only to imperfection of memory, a defect as likely to occur in the testimony of other observers as his own. It frequently happens that the probability of innocent mistake by the actor is so remote that the Court must adjudge him guilty of wilful perjury unless his testimony is accepted as true, and Courts strenuously endeavour to avoid the imputation of perjury to apparently credible witnesses. On the other hand, the actor is often a witness who is attempting by his own testimony to exonerate himself from a charge of negligence, and this makes a biased witness, whose memory may not be entirely trustworthy, although such bias would not alone justify a finding that he has corruptly testified to a falsehood. Moore on the Weight and Value of Evidence, Vol. II, 1908, S. 705, p. 761.

A railway passenger "ought to know whether he had his arm outside of the window or not," when it was struck by a passing car. 179 Pa. St. 327, 39 Atl. Rep. 207. In an action against a physician for malpractice, there was some expert opinion evidence, "but above all, in this case," said the Court instructing the jury, "take the testimony of the witnesses who were actors in it"—the plaintiff and the defendant. 93 Me. 345, 45 Atl. Rep. 299. If the actor is a credible person and has the surrounding probability on his side, his testimony should outweigh that of any number of witnesses who tell a less probable story of events not observed under conditions specially favourable. New York Sun of July 10, 1906.

### Illustrations

(i) David Pankin of 206, Canal Street, accompanied by his wife Rebecca, and his grown up son Isidore, started for a wedding in Brooklyn on Sunday afternoon. By taking a flying leap the father succeeded in boarding a Hamburg-avenue car at the Williamsburg Bridge, pulling his wife or

after; the son was left behind, and his way was barred by a railroad inspector.

"Come anyway. Isidore," shouted Pankin Senior, who had a luxuriant beard.

"Put your head in there, whiskers," Policeman Scannel of the Bridge squad is alleged to have shouted. This started an altercation between the two men, and Pankin Junior alleges the Policeman pulled his father off the car by the beard. He and the Policeman then got into a wrangle, and Isidore was dragged to the Delancey Street station-house and charged with disorderly conduct. When the prisoner was arraigned in the Essex Market Police Court three witnesses swore that they saw Scannell pull Pankin's whiskers. The Policeman denied the charge absolutely, and said that the trouble arose through his attempting to bar the young man's way to the car. Magistrate Whale said that while he did not think the witnesses had perjured themselves, he believed their impression, owing to the excitement, was wrong. Scannell, he said, might have touched Pankin, but he did not believe any Policeman would drag a man around by the whiskers. He said he believed Pankin resisted the Policeman's efforts to keep him off the car. Pankin was fined £3. Moore on Facts, S. 711, Vol. II.

(ii) It has been observed in the chapter relating to dacoity cases that only persons who had sufficient opportunity to recognize the dacoit could be believed as to their identification. If the inmate of the house was beaten by a particular dacoit he would be in a position to identify him. It has been held in some cases that identification made at night during dacoity when blows are struck and people are terrorized is generally of little value. 1927 C. 820 : 28 Cr. L. J. 874.

## CHAPTER 77

### Of Biased or Interested Witness

Among commoner sorts of circumstances which create bias in the minds of witnesses are all those involving some intimate relationship to one of the parties by blood or marriage or illicit intercourse, or some such relationship to a person other than a party, who is involved on one or the other side of the litigation or who is otherwise prejudiced for or against one of the parties. The relation of employment, present or past, by one of the parties, is also usually relevant. The present or past litigation with the opponent or in which an opponent is, or was interested, is another circumstance which affects the trustworthiness of the witness. Wigmore, S. 949. Many persons even in the gravest emergencies allowing themselves to be influenced, more or less by their religious, political or social standing, by considerations of family, of profession, perhaps even of club or society, and that without the slightest intention of departing by a hair's breadth from the truth; there are many details which they wish neither to see nor to hear, or they see and hear them otherwise than the actual happening, so that a witness who would naturally be for the prosecution becomes one for the defence, and *vice versa*. Dr. Hans Gross, Criminal Investigation, p. 91. It frequently happens that the probability of innocent mistake by the actor is so remote that the Court must adjudge him guilty of wilful perjury unless his testimony is accepted as true, and Courts strenuously endeavour to avoid the imputation of perjury to apparently credible witnesses. On the other hand the actor is often a witness who is attempting by his own testimony to exonerate himself from a charge of negligence, and this makes a biased witness, whose memory may not be entirely trust-

worthy although such bias would not alone justify a finding that he has corruptly testified to a falsehood. See Moore on the Weight and Value of Evidence. Vol. II; (1908), §. 705, p. 761. When you examine the testimony of witnesses nearly connected with the parties, and there is nothing very peculiar tending to destroy their credit when they depose to mere facts, their testimony is to be believed; when they depose to matter of opinion, it is to be received with suspicion. Moore on Facts, pp. 1224—1254. Even where witnesses are upright and honest their belief is apt to be more or less warped by their partiality or prejudice for or against the parties. "It is easy to reason ourselves into a belief of the existence of that which we desire to be true, whereas the facts testified to, and from which the witness deduces his conclusions might produce a very different impression on the minds of others." 6 G. 324—343. Our opinions are much more frequently founded on prejudice or biased by our feelings, than we are aware of. 1 Paige (N. Y.) 171—173. All men are extremely liable to be biased in their opinions by their interest and their inclinations. 21 Fed. Cas. No. 12, 374 (at p. 532). In forming opinions the mind is insensibly biased by its passions and prejudices, its interests and its associations. 18 Fed. Cas. No. 10, 189 (at p. 128). "I am very sorry to say that even respectable witnesses are apt to form a strong bias," and Lord Campbell, in the Tracy Peerage case. 10 Cl. & F. 154 (177). Exaggeration is the most common vice of biased witnesses. L. R. 1 P. & D. 483, 492. "They make mountains of molehills," said Lord Stowell. 1 Hag. Cons. 35, 59, 4 Eng. Ecc. 310, 326. "Although they may be honest in their purpose," said another Judge, "they cannot, while human nature remains unchanged, overcome the tendency to distort, magnify or minimize the incidents which they relate as their interest persuades." Me. 72, 66 Atl. Rep. 215, 227.

"Whether a witness may be discredited by a course of examination showing motives, interest, or conduct adverse to the side against which he is called, is a question on which the authorities are in some conflict. The prevailing opinion however is that he may. It is not only that questions might be asked tending to impeach the partiality of the witness, but the answers may be contradicted by other testimony; and it is impossible to dispute that the partiality of the witness is an important element in the value of his testimony. Disguise the fact as one may,—nay, let an honest witness even struggle against the effect, constituted as the mind is with a liability to have all its perceptions influenced by the medium through which they pass,—it is not possible to deny that motive or interest might, however imperceptible to himself, often give a very important colouring to the facts, even in the mind of the witness, to say nothing of their grosser influences against the cause of veracity." See Rahmatullah, p. 73.

"No doubt," observes Mr. Taylor "it is an object of great importance to confine the attention of the jury as much as possible to the specific issues; but it seems highly essential to the discovery of truth, that those who are to determine the respective value of conflicting testimony, should be enabled to discriminate between the interested and disinterested witnesses, and no test of interest can be more sure than that which is afforded by the conduct of the witness himself. The argument that the witness cannot come prepared to defend himself against particular charges without notice, may be a very good reason why evidence that he has been guilty of a specific crime, unconnected with the cause or parties, should not

be adduced, because, even were such a fact proved, it would raise in the absence of interest, only a very faint presumption that he had been guilty of perjury; but this argument should not be allowed to extend to a case where the charge, if true, would show that the witness either had a motive to swear falsely, or was not very scrupulous in the selection of means to attain his end. A charge, too, of this nature would almost of necessity apply to some act of recent date, and such as might be easily explained or rebutted by the witness, if it were made without foundation. Moreover, this inquiry would seem, at the present day, to be all the more necessary, as witnesses are no longer incompetent to testify on the ground of interest or crime." Taylor on Evidence, Vol. II, p. 1250.

"If you see that the witness is biased, you must employ some artifice. Direct questions will not suffice. You must approach him with caution, and indirectly. Begin by giving him credit for good intentions. Do not appear to mistrust him. Flatter him even with the assurance that you believe he desires to tell the whole truth. It is a great point to have him pleased with himself, for your purpose is, not only to unveil him to others, but to strip from his own eyes the veil of self-deception so that his vanity will not be enlisted against you. Remind him, by your first question, that he is a party to the cause, and has the strongest interest in the result. Follow it with the assurance of your own confidence, that, in spite of this bias, he desires to tell the whole truth; but, although he was no intent to deceive; the truth is not as he has stated: blinded by his feelings or his interests, he has seen the truth only partially, or distorted, or falsely coloured. Your duty is either to elicit the very truth as it was or to show that, being thus self-deceived, his testimony is not to be relied upon. How may you best do this? Remember the position of the witness. He has impressions upon his mind which he *believes* to be *true*. He, therefore, unhesitatingly swears to them as facts. It is obvious that direct questioning will fail to effect this, for to a mere repetition of the question as to what he saw or heard, the same answer as before will be given. Again he tells you what was his impression of the fact, and it is all that he can tell you; it is all in truth which any of us can tell, for with every man, knowledge is only of the impressions of his own mind, and not of *the very fact itself*, which may present itself to many minds in many different aspects. The only means of shaking such testimony is to show it to be inconsistent with other facts, or with those strong probabilities arising out of the usual order of things, the ready perception of which constitutes what is called common sense. It is in eliciting this inconsistency either with the rest of the story, or with the common-sense of mankind, of which a jury is generally a pretty fair representative, that the skill and ingenuity, aided by the experience, of an advocate is demanded."

"There is no difference in this respect in the cross-examination of a party, and that of any other interested witness. In both instances the process will be the same; to approach him by indirect and not by direct questions, and to employ all your efforts to elicit contradictions and inconsistencies between the facts positively asserted by the witness and other undoubted facts, or between his testimony and probability and common-sense; from which you may argue that no reliance can be placed upon the evidence, not because the witness has been guilty of perjury, or intends to deceive, but because he has fallen into error. This is an

argument which rarely fails to convince, because it is in accordance with experience, and is infinitely more effective than one which imputes every mistake or mis-statement to deliberate perjury." See Cox's Advocate.

**Detection of Partiality.** Witnesses "too willing and too swift," 2 Heisk (Tenn) 71 answering without waiting to her the question, 92 Ala. 559. So. Rep. 530, eagerly striving to give their testimony in defiance of objections and rulings, 3 Redf. (N. Y.) 384, and showing an inclination to volunteer and inject statement favourable to the party for whom they testify, 96 Me. 161, 51 Atl. Rep. 868 do not command much respect 140 Fed. Rep. 161, 174 per Dayton, D. J. "These witnesses do not impress me favourably. They testify too readily and too much," said Judge Dayton of the American Court. "Where a witness has a direct personal interest in the result of a case the temptation is strong to colour, pervert, or withhold the facts," 90 Fed. Rep. 257 per Bradford, J. The testimony of an interested witness, in his own favour, is always looked upon with distrust and suspicion, especially if it is opposed by disinterested testimony. 65 Wis. 323, 27 N. W. R. 147. Where testimony is equally balanced in all other respects, a slight degree of interest or connection may be sufficient to turn the scale. Moore on Facts, Vol. II, S. 1103, p. 1239. But perjury is not to be imputed to a witness. 24 Fed. Cas. No. 1: (662). We may draw inferences from facts disclosed by a prejudiced or an unwilling witness, which would scarcely be admissible if he was impartial and unbiased. 10 N. Y. 482 per Willard, J. Witnesses with a large pecuniary interest at stake are under strong temptation to shake their testimony so as to promote their interest. 173 U. S. 38, 19 U. S. Sup. Ct. Rep. 352.

Interest speaks all languages and acts all parts, even that of disinterestedness itself.

Interest makes some people blind.—*Beaumont.*

**Kinds of Biased or Interested Witnesses.** It is contrary to professional ethics for an attorney to become a witness for his client without first entirely withdrawing from any further connection with the case. 68 Conn. 201, 36 Atl. Rep. 38. An attorney in the cause should never testify when the facts he is expected to disclose can be proved by other witnesses. 82 A. R. K. 432, 102 S. W. R. 690. Experience teaches us that we may be biased in favour of our associates, whether in church, in a club, or in a business institution. 176 N. Y. 150, 68 N. E. Rep. 148. The influence of the interest of a friend of a society of which the witness is a member is almost as strong as original self-interest; and it is more insidious because we are not so careful to guard against it, inasmuch as it bears the semblance of a virtue. 18 Fed. Cas. No. 10, 189 (Per Cuream). No discredit can legally attach to the testimony of a person because it is given on behalf of a property belonging to his own nationality. 118 Fed. Rep. 442. Near relationship between a witness and the party for whom he testifies, is an influence, which, common experience teaches us, tends to bias consciously or unconsciously the testimony of witnesses. 176 N. Y. 150, 68 N. E. Rep. 148. When an employee is testifying, it may be shown that his employer is interested in the prosecution. 14 So. Rep. 409. A sister of a party no doubt would have a strong interest in favour of her brother. 3 Knapp. 122. The testimony of employees of a party is of course open to the criticism "that they would naturally testify, as far as they possibly could, in favour of their employers." 33 Misc. N. Y. 337 (68 N. Y. Supp. 477, 483). It is a matter of familiar experience in action for injuries arising from negligence, that witnesses charged with the performances

of certain duties, to the omission of which the accident is attributed, seldom admit that there was any negligence on their part, but generally testify that everything was done by them that ought to have been done. 8 Daly (N. Y.) 231, per Daly C. J. No man is an absolutely disinterested witness where his testimony relates to the question of the *performance or non-performance of a duty* which he owned on account of the position which he occupied. 189 U. S. 354, 361, 23 U. S. Sup. Ct. Rep. 585. In collision cases "between vessels, the pilot or other individual upon whom rested the primary responsibility for careful navigation is a biased witness when testifying in justification of his own conduct." 29 Ch. Div. 366, 402. One may have a strong bias in his mind from what he conceives to be the justice of the case. 1 Hag. Ecc. 384, 406. It is lamentable fact that the disposition to help the side calling the witness is (unconsciously perhaps) shown by many. 20 Neb. 529, 31 N. W. Rep. 1, 3. Discovery that a witness has a *pecuniary interest* in the suit, which he attempted to conceal while testifying, is extremely prejudicial to his credit. 2 Rich. L. S. Car. 184. In a New Jersey case, "no weight was given to the testimony of a witness who narrated a somewhat doubtful story, and was the *real complainant* in the suit, but did not disclose that fact until it was wrung from him at the tail-end of his cross-examination." 61 N. L. Eq. 480, 48 Atl. Repl. 329. Lord Campbell said, that "hardly any weight is to be given to the evidence of what are called *specific witnesses*: they come with a bias on their minds to support the cause in which they are embarked. 104 Wis. 307, 80 N. W. Rep. 644, 653. Taylor in his "Law of Evidence" says: "*Expert witnesses* become so warped in their judgment by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of expressing a candid opinion." Wellman, p. 72. "With all men, in all employments," said Judge Hammond, "benevolence and sympathy with those who seek a mere *opinion* upon subjects of expert knowledge dominate the judgment that is given. It is a human tendency, and is the weakness of all expert testimony." 80 Fed. Rep. 85. *Experts* on both sides of a cause become too often eager attorneys before the trial is ended and before their testimony is given. 71 Mich. 158, 30 N. W. Rep. 28, 34.

"Considerable experience has taught men," said Surrogate Calvin of New York, "that the testimony is to be given, and whose testimony in his favour is assured beforehand, is likely to be considerably influenced by the fact that the experts have been employed as such by the party calling them, and that, while on the stand, they are paid to have a theory, which they are zealous to maintain; and, as a general rule, they fall short of that impartiality which characterizes ordinary witness in Court; and this observation has led me to scrutinize with great care the testimony given under such circumstances, and, for this, I have the warrant of one of the most accomplished Jurists of this country." 5 Redft. (N. Y.) 47 (at p. 61). Ordinarily a *woman* testifying on behalf of her husband is put in the category of biased witnesses, whose testimony must be received with some allowance when it is opposed to probabilities or disinterested direct testimony. Moore on the Weight and Value of Evidence, Vol. II, 1908, S. 925. A woman testifying for the contest of a will spoke of a lamp chimney which broke while the testator was intoxicated in his store. To emphasize the breaking of the chimney, and impress, if possible, the danger of the situation created thereby, she swore that it broke into 'a thousand pieces.' Animadverting on this bit of hyperbole the Court said: "Common experience teaches us that it would be a most unusual—

indeed almost miraculous—thing for a heated lamp chimney to break into a thousand pieces. As we read the testimony, we involuntarily conclude that the witness did not meant her statement to be taken literally; and yet the expression betrays a lack of exactness in truth, and *zeal in behalf of the contestant's* case which must affect the credit we accord the witness." (N. J. 1893) 27 Atl. Rep. 636 at p. 637.

**Value of the Testimony of Interested Witnesses.** It is opened to Magistrate to rely on the evidence of any person, although interested 1930 C. 645, 51 M. 956, 1931 L. 529, 1929 M. W. N. 587. Conviction based on the evidence of interested witnesses whose names were not mentioned in the First Information Report as eye witnesses and whose evidence is contradicted by other witnesses, is not maintainable. 92 I. C. 175 : 27 Cr. L. J. 223. Conviction on the uncorroborated evidence of an interested witness, who was a collateral, though not a near relative of the deceased whose family had enmity with the accused, is not safe 1922 L. 76. The mere fact that witnesses are relatives and interested is no ground to disbelieve them if the point can only be established by their testimony. 32 I. C. 380. Where a fight takes place in a shop, it is scarcely likely that the shopkeeper and his family members would give evidence against their own customers. Their inclination would be to say that nothing disorderly had taken place at their shop, which they hold under a license from the Government. 2 P. 399 : 1923 P. 413.

Where witness's brother brought a complaint against accused's cousin one year back the witness is not an interested one. 1925 L. 318 : 26 Cr. L. J. 757. *Zaildars* and *Sufaidposhes* are interested to give evidence on the Police side. 110 I. C. 674 : 29 P. L. R. 539. The evidence of a servant who is not respectable is not of much value. 1922 P. 88. If evidence on both sides is interested, guilt of accused should be judged from surrounding circumstances. 1933 L. 1055. Where accused and complainant contested election and complainant's witnesses failed election Petition, it is not safe to rely upon their testimony. 1942 O. 60=43 Cr. L. J. 115. It is for the Jury to decide whether they would accept the evidence of interested or biased witness. 1946 P. C. 151 (155). It may be noted that interested evidence is not necessarily false 1938 S. 202=40 Cr. L. J. 93. It can be acted upon if corroborated by other evidence. 1938 P. W. N. 681. The fact that the witnesses used defensive measures against the rowdies and freely gave evidence about the death of two companions do not make them interested. 1942 M. 446 = 43 Cr. L. J. 813.

### Illustration

One high-toned witness 'Squire Melton' was examined by the defendant. He was turned over to Colonel Netherland for cross-examination which he did in this style.

Q. "You are brother-in-law of the defendant ? A. "Yes."

Q. "This evidence of yours—did he get up or was it a scheme of your own ?" A. "It was a scheme of my own."

The counsel asked the witness to stand aside, 11 Cr. L. J. 27.



## CHAPTER 78

### Of Child Witness

#### *Competency and Credit of Child Witness*

Section 118, Evidence Act, provides that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. See S. 118, Ev. Act.

There is no more dangerous witness than a child. When a child is a witness, it will be natural to receive its evidence with proper caution. A child may be very quick to perceive aright some things which it sees or hears; but from want of knowledge or experience it may perceive imperfectly other things it sees or hears. In seeing, it may mistake one thing for another and in hearing may misunderstand words, and for those which it heard may substitute others of a different meaning. And there is danger lest a child should borrow somewhat from its imagination, or from what it has heard other people say and so amplify facts beyond their just measure. But a child is naturally artless, and means to speak the truth. It is not, however, to be forgotten, that child is open to be beguiled, biased, influenced, or intimidated by the false representations, or the promises or threats of designing people. But hesitation, confusion or embarrassment in telling its story may not be the effect of its doubt about what it saw or heard, or its wavering between inclination to speak the truth or falsehood, but may merely and naturally be the effect of timidity or bashfulness, or of its not fully understanding the words, or the drift of a question put to it. Whenever anyone gives evidence upon oath, the knowledge by him of the importance it may have in its consequences to the person, for or against whom it is given, is in addition to the sanctity of the oath, some security against his giving false testimony. Of this importance, a child may in many cases be a very inadequate Judge.

"The age and the sex of the witness are of great importance. Of course, we cannot fix absolutely the age at which witnesses are more or less worthy of credit; we must take into account all the other elements which go to make up a man, his natural qualities and intellectual culture. But still certain broad rules may be laid down as to age."

"In one sense the best witnesses are children of seven to ten years of age. Love and hatred, ambition and hypocrisy, considerations of religion and rank, of social position and fortune, are as yet unknown to them; it is impossible that preconceived opinions, nervous irritation or long experience should lead them to form erroneous impressions; the mind of the child is but a mirror that reflects accurately and clearly what is found before it. These are great advantages, accompanied, however, by certain corresponding drawbacks. The greatest is that we cannot place ourselves at the point of view of the child; it uses indeed the same words as we do, but these words convey to it very different ideas. Further, the child perceives things differently from grown-up people. The conceptions of magnitude, great or small; of pace, fast or slow; of beauty and ugliness; of distance, near or far,



are quite different in the child's brain from in ours—still more so when facts are in question. Facts to us perfectly indifferent delight or terrify the child and what for us is magnificent or touching does not affect it in the least. We are ignorant of the impression produced on the child's mind. There is yet another difficulty; the horizon of the child being much narrower than ours, a large number of our perceptions are outside the frame within which alone the child can perceive. We know, within certain limits the extent of this frame; we should not for instance, question a child as to how a complicated piece of roguery was committed or how adulterous relations have developed; we know it is ignorant of such things. But in many directions we do not know the exact point where its faculty of observation commences or stops. At times we cannot explain how it does not understand something or other, while at other times we are astonished to see it find its bearings easily among matters thought to be well beyond its intelligence. We are as a rule too distrustful of the capacity of a child. We have rarely found too much expected of it, while we have often discovered that it knew and noted much more than any one imagined. The same experience occurs to us in daily life. How many times do not people speak in its presence of things a child is not supposed to understand, only to discover later on that it has not only understood very well but has combined the information with other things heard before or after. Again it must not be forgotten that a child is peculiarly exposed to external influences, whether designed or accidental. Any one, knowing that a child is to appear as a witness in a Court of justice, if he is interested in its statements and has the chance of influencing it himself, will almost certainly exert that influence. The child, as yet devoid of principles, places great faith in the words of grown-up people; so if a grown-up person brings influence to bear on it, especially some time after the occurrence, the child will imagine it has really seen what it has been led to believe. This result is obtained with certainty if the man proceeds slowly and by degrees leading the child to the desired goal by repeated simple questions, as 'It is not so?' 'It was not so, was it not thus?' "The result is the same, when the influence is undersigned. An important event happens; it is naturally much talked of, all sorts of hypotheses are started; there is gossip of what others have seen or might in certain circumstances have seen. If a child, which has itself seen something of the occurrence, hears these conversations, they become deeply engraved on its young mind, and ultimately it believes it has itself seen what the others have related." "One must therefore be always careful in questioning children, but their statements, if judiciously obtained, generally supply material of great value."

"In passing from the child to the succeeding age, it becomes necessary to distinguish sex; for just as sex differentiates in external appearance the youth from the girl, so are they differentiated in their methods of perception." "An intelligent boy is undoubtedly the best observer to be found. The world beings to take him by storm with its thousand matters of interest; what the school and his daily life furnish cannot satisfy his overflowing and generous heart. He lays hold of everying new, striking, strange; all his senses are on the stretch to assimilate it as far as possible. No one notices a charge in the house, no one discovers the bird's nest, no one observes anything out of the way in the fields; but nothing of that sort escapes the boy; everthing which emerges above the monotonous level of daily life gives him a good opportunity for exercising his wits, for extending his knowledge, and for attracting

the attention of his elders, to whom he communicates his discoveries. The spirit of the youth not having as yet been led astray by the necessities of life, its storms and battles, its factions and quarrels, he can freely abandon himself to everything which appears out of the way ; his life has not yet been disturbed by education, though he often observes more clearly and accurately than any adult. Besides, he has already got some principles ; lying is distasteful to him because he thinks it mean ; he is no stranger to the sentiment of self-respect and he never loses an opportunity of being right in what he affirms. Thus he is, as a rule, but little influenced by the suggestions of others, and he describes objects and occurrences as he has really seen them. We say again that an intelligent boy is, as a rule, the best witness in the world.

It is a different affair with a young girl of the same age. Her natural qualities and her education prevent her acquiring the necessary knowledge and the breadth of view which the boy soon achieves, and these are conditions absolutely indispensable for accurate observation. The girl remains longer in the narrow family circle, at her mother's apron strings, while the boy is off with his playmates, picking up in the fields and the woods all sorts of knowledge of the ordinary aspect of common things, which is the best training for discovering, distinguishing and observing anything extraordinary or out of the way when it turns up. With his father and his playmates the boy learns to know the great sum of practical things of which life is composed, and which one must know before being able to talk about them. The girl has no training of this sort : she goes out less, she has little to do with workmen, artisans, or tradesmen, who are in many ways the schoolmasters of the boy anxious to learn : she sees nothing of human life, and when anything extraordinary happens she is incapable, one might almost suggest, of seizing it, with her senses, that is to say, of observing accurately. If besides there be danger, noise, fear, all of which attract the boy and serve to excite his curiosity, she gets out of the way in alarm, and either sees nothing or sees it indistinctly from a distance. A young girl may in certain circumstances be even a dangerous witness, when she is interested in the matter or is herself perchance the centre. In such a case strong exaggerations and even pure inventions are to be feared. Natural gifts, imagination, dreaming, romantic exaltation, such are the natural degrees by which the girl too young yet to have any interesting experiences of her own, arrives at last at 'Byronism.' Now Byronism is a sort of ennui or weariness of life, always urging one to seek for change and what happier variety could there be than a criminal matter in which the little lady finds herself mixed up ? It is interesting enough in itself to appear in the witness-box, to make a deposition and to intervene in the destiny of another, but how much more noteworthy is it when an important matter is in question, when the attention of every one is turned upon the witness, when all the world is breathless to learn what she has been asked, what she has replied, and how the case is going to turn. Thus an insignificant theft is easily magnified into robbery with violence ; the witness, out of a miserable swindler manufactures a pale and interesting young man ; a coarse word becomes a blow ; an insignificant event develops into a romantic abduction ; stupid chaff turns up a great conspiracy. A young girl is also a very dangerous witness at, and often previous to the period of her first menstruation or, as it is called in India, 'attaining her age.' Many women remains similarly influenced throughout

their whole life, before and during each period of menstruation. Climate is frequently a factor in causing this aberration. In short, too great care cannot be observed in interrogating a young girl, to whatever class or society she belongs. But, to be just, we must recognize on the other hand that no one notices and knows certain things more cleverly than a young girl. If her agitation does not carry her away, she can furnish information more valuable than any grown-up person. The reason is the same as we have given for her exaggerations and inventions. Her school, her life, her daily tasks, do not afford sufficient nourishment for her imagination and her dreams: the sexual instinct beings to awaken she searches around her, almost unconsciously, for incidents touching however remotely, this sphere. No one discovers more rapidly than a sprightly young girl approaching maturity the little carryings-on and intrigues of her neighbours; the delicacy of her sensibility enables her to seize the least shade of sympathy which the pair she is observing have for each other; and long before they have found it out themselves, she knows what their true feelings are for each other. She notes accurately the birth of the intimacy; she knows when they spoke for the first time. And she anticipates long before what the result will be, reconciliation or reapture; in short, she knows everything earlier and better than any one else in her circle. Connected with this is the trick young girls have of spying on certain people. An interesting beauty or a young man, acquaintance have no more vigilant watcher of all their goings-on than their neighbour—a little girl of twelve to fourteen. No one knows better than she, who they are, what they do, what company they keep, when they go out, and how they dress. She even notes the moral traits of those coming under her supervision—their joy, their grief, their disappointments, their hopes, and all their experiences. If one desires information on such subjects, the best witness are school girls—always supposing that they are willing to tell the truth. See *Criminal Investigation* by Dr. Han-Gross, pp. 93—95.

It is very difficult for a grown man to put himself in the place of a child, to see the world again with childish eyes, and to think with a child's brain. It is a gross error to believe that children are always innocently ignorant; their stock of knowledge is often startling, and how it is obtained is a puzzle. Never talk down to a child, for to do so is not only an impertinence but a blunder. Be simple and straightforward, and you will usually receive the same treatment from them: not always, of course, for children can lie with astonishing glibness and artistry. In kind a child is no more different from a man or a woman than is an untutored savage from the cultured child of civilization; the difference is in experience and attainments. In many cases where an adult cannot make an unbiased observation, owing to prejudices or domineering expectations, children will be quite disinterested and merely curious. On the other hand when questioned they are more open to the influence of suggestion. Also, some children are possessed by very active imaginations, which mislead them into embroidering their stories, sometimes with disastrous results. Quite like adults, they are shy of admitting ignorance when evidently knowledge is expected, with the result that leading questions frequently give rise to misleading answers. Naturally they have not experience to enable them to distinguish between the harmful and the harmless untruth, especially as so much of their play is pretend and make-believe. See *Crime and Its Detection* by W. T. Shore, Ed. 1932, p. 133.

One further remark must be made on a child's evidence. However humiliating to human nature, however appalling the fact may be, true it is, and it must not be lost sight of, that a child even of tender years, is capable, not only of committing perjury but the crime, than which there is none greater, murder, as in the instance related by Sir Michael Foster, of a boy of ten years of age convicted at Bury Assizes in 1748 of the murder of a girl about five years old." *Ram on Facts*, 154-155, Foster, 70.

Children are not expected to remember the dates of events. *Moore on Weight and Value of Evidence*, Vol. II, 1907, S. 895.

Mr. Train says "Children are proverbially observant, and make remarkable witnesses, habitually noticing details which inevitably escape the attention of their elders" *Train, The Prisoner at the Bar*, p. 225.

Commenting upon the testimony of a boy six years old the Court said: "There is of course some danger that a child of tender years may be influenced to tell what is not true. But the inability of such an inexperienced boy to keep up a consistent false story through the various questionings of a trial is a pretty safeguard against any great danger on that head. He is far more likely to answer wrongly from not fully understanding questions put to him, than from deliberate falsehood. His method of telling his story here was simple and childlike, and, so far as we can tell from a paper description of it, was candid and honest." 44 *Mick*, 286, 287 *Per Campbell, J.*, 6 *N. W. Rep.* 669 at p. 670.

The following decisions will indicate a young child. Any mistakes or discrepancies in their statements are ascribed to innocence and failure to understand and undue weight is given to what is merely a well taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make believe, so that they often actually believe what they are taught to relate. 1929 *C.* 390; 122 *I. C.* 209; 31 *Cr. L. J.* 373; 33 *C. W. N.* 664, 1930 *O.* 406, 1932 *L.* 667; 31 *Cr. L. J.* 606. When the Court is of opinion that the child upon whom an offence under S. 376, *I. P. C.*, is committed is unable to give relevant information by reason of immaturity of judgment, it should not examine the child at all. 32 *Cr. L. J.* 63; 1930 *L.* 337; 127 *I. C.* 362; 31 *P. L. R.* 612, 38 *A.* 49. Before a child of tender years is actually examined in a case the Judge should test his capacity to understand and to give rational answers and to understand the difference between truth and falsehood. 11 *C. W. N.* 51, 33 *A.* 49.

If the child can give a rational account of what he has seen or heard done on a particular occasion, he is a competent witness. 11 *A.* 183, 23 *A.* 90, 1930 *S.* 129; 31 *Cr. L. J.* 114. The mere fact that a Judge omits to put on the record preliminary questions to a child to test his capacity to give evidence, will not render the evidence inadmissible, if the Judge as a matter of fact is satisfied about the capacity to give the evidence. 1923 *P.* 91; 66 *I. C.* 73; 23 *Cr. L. J.* 233; 41 *C.* 406. The evidence of a child of tender years without solemn affirmation is admissible in evidence, though it should be received with due care and caution. 38 *M.* 550, 38 *A.* 49, 45 *I. C.* 497; 20 *Bom. L. R.* 365; 19 *Cr. L. J.* 593, 1932 *L.* 332, 1923 *P.* 91, 61 *I. C.* 705. If the child who was raped, is unable to give relevant information by reason of tender years, the Court should not examine her at all. 32 *Cr. L. J.* 63; 1930 *L.* 337: If a girl of six years gave reasonable and comprehensible answers, she was a competent witness, 1932 *C.* 723, and her evidence should be relied upon. 1921 *P.* 109; 22 *Cr. L. J.* 417. It is not likely for a child of seven years to distinguish between things which he has heard and those which he has seen when inconsistent

statements occur in his evidence, much importance should not be attached to his testimony. 1934 P. 651, 1923 P. 91. Children are a most untrustworthy class of witnesses, for they often mistake dreams for reality and repeat glibly as their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and by desire of notoriety. 1933 L. 667 : 34 Cr. L. J. 606. The only test of competency is that the witness should not be prevented from understanding the question put to him or from giving rational answers due to tender years or other causes. 1927 P. 406.

When a witness is presented as witness, it may be objected (1) that he is incompetent to testify, (2) that an oath, or affirmation cannot lawfully be administered to him. The first objection falls under S. 118, Evidence Act, while the second under S. 342, Cr. P. C. 38 P. R. 1887 Cr. In every case evidence of child of 10 or 11 years whether sworn or unsworn must be corroborated. 1946 P. C. 3, the real tests are, how consistent is the story with itself, how it stands the test of cross-examination and how for it fits in with the rest of evidence and the circumstances of the case. 1936 P. C. 60.

**Oath to Child Witness.**—According to S. 5 of the Oaths Act the witness must be examined on oath or affirmation. S. 13, Oaths Act, provides that an "omission to take any oath or make any affirmation", or any irregularity in the form of an oath or affirmation will not invalidate any proceeding or render any evidence inadmissible. It has been held in some cases that S. 13, Oaths Act, only applies to an accidental or negligent and not deliberate omission to administer an oath and, therefore, where a child of 8 or 9 years old has advisedly been examined without oath or affirmation on the ground that it has not attained sufficient maturity to comprehend the spiritual or temporal consequences of making a false statement and the obligation of making a true statement, the evidence is inadmissible. 10 A. 207, 11 A. 183, 27 Cal. 428, 17 Cr. L. J. 500 : 36 I. C. 468, 43 I. C. 86 : 19 Cr. L. J. 54, *contra* 16 B. 359, 45 I. C. 497 : 19 Cr. L. J. 593, 5 Bom. L. R. 551. A child may have sufficient maturity to understand and rationally answer the question put to him and may, therefore, be a competent witness under S. 118, Evidence Act, and yet he may not have sufficient maturity to understand the obligation of an oath. In such a case it would obviously be inadvisable to administer the oath to him. Hence, even deliberate omission to administer the oath would not make the evidence of a child witness inadmissible. 16 B 359, 38 A. 49, 38 M. 550, 1923 L. 332 : 25 Cr. L. J. 317, 1921 P. 109. 45 I. C. 497, 7 Cr. L. J. 89, 5 Bom. L. Rep. 551.

A critical examination of the contents of both pathological and normal minds leaves little doubt, says Professor Colegrove, that memories both rational and irrational are modified by dreams. "If a dream serves to connect a certain idea with a place or person, and subsequent experience does not tend to correct this, we may keep the belief that we have actually witnessed the event, and we may naturally expect that this result will occur most frequently in the case of those who habitually dream vividly, as young children. See Sully, as quoted in Colegrove on Memory, p. 108.

The administering of an oath to children was strongly deprecated by Rev. F. Denison Maurice, because it conveys to them either no meaning or else every sort of meaning. "Chief Baron Pollock is reported to have made an admirable remark on one occasion," said the noted divine, "when a girl who was called as a witness showed manifestly that she did not understand anything about oaths or obligations. It was suggested that the

case should be postponed till she could obtain the necessary instructions on the subject. The Chief Baron suggested that probably the little girl would lose more in memory during the interval than she would gain in ethical science. Who that knows anything of children will not recognize the sound sense, as well as the grave humour of that observation? I do not know what the case before the Court was. But suppose there had been an act of house-breaking, and this child had heard or seen a man come in by the window. She had observed perhaps a patch on his eyebrow, or that he had one of his front teeth knocked out. Her impression on these points might be livelier than that of a grown-up person; her story simpler. But while you are talking to her about moral obligations, she becomes utterly confused. The black patch or the broken tooth loses all its distinctness. It might have been her own, or have belonged to that ugly thing called an obligation. That or any other spectre may have come through the window. So you have made a considerable sacrifice of the interests of justice in your zeal to test the child's theory about moral obligation. But, if I ventured to speak my own professional language, I should say there was a heavier injury inflicted on the child herself. I should say that something more sacred than the child's memory would suffer from such treatment. Its conscience would become more stupefied if it had never been cultivated, less simple and clear if it had, through these hard and premature experiments. A child is not taught by wise parents the meaning of kissing a book. It is taught not to lie; it is told that God is true and hates lies. If you substitute one kind of teaching for the other, when it comes into a Court you do not obtain fresh protection for its veracity; you lose the protection that you had. There is a poem of Mt. Wordsworth's with the title, 'How Children may be Taught to Lie.' His experience showed him, that if you insist upon knowing the reason of a boy's or girl's likings or disliking, the reason will be produced; it will be invented on the spot. I am afraid the Courts have found a still more effectual method of securing the same result. If, on the other hand, the child has already been taught to lie, if it comes primed with lies into the witness-box, your terrors will not frighten it. The expectation of the flogging which awaits it at home if it stumbles into any wrong confessions will be far more effectual than the apprehension of any more distant punishment which may be in reserve for it if it does not speak all that it knows."

Commenting upon the testimony of a boy six years old the Court said: "There is of course some danger that child of tender years may be influenced to tell what is not true. But the inability of such an inexperienced boy to keep up a consistent false story through the various questionings of a trial is a pretty safeguard against any great danger on that head. He is far more likely to answer wrongly from not fully understanding questions put to him, than from deliberate falsehood. His method of telling his story here was simple and childlike, and, so far as we can tell from a paper description of it, was candid and honest." 44 Mick 286.

#### Illustration!

During the examination on the *voir dire* of a witness in order to test his competency to give evidence, the following idea given by the witness as to the nature of an oath may be noted:—

Q. "Explain to the Court the nature of an oath." A. "Suppose I tell a lie when I go to die there will be a heap of trouble for me, and before that I would also have plenty of trouble here, for the Judge would send me to the State prison."

Q. "Suppose you tell the truth, what then?" A. "Suppose I tell the truth, then, the Judge would send your client into the State prison."

"The witness," said the Judge blandly, "is clearly qualified. Let him be sworn." See 29 M. L. J. 127.

**Value of Child's Testimony in Divorce Cases.** The intelligence and truthfulness of a boy commanded confidence where "he was subjected a very thorough cross-examination, which in no particular detracted from the force of his testimony in chief." R Co., 171 Pa. St. 101, 106, 32 Atl. Rep 669 at p 670. In a Michigan divorce case the children of the parties were called to testify to the adulterous conduct of their mother "witnessed by them at an age when they could scarcely be supposed able to understand the significance of facts sworn to," said Judge Cooley, who thought it "exceedingly unsafe to grant a divorce on the testimony of such children," and was "not disposed to encourage a practice of such evil tendency as the calling them as witnesses against their mother for such a purpose, and at such an age." 28 Minch. 344, 345. Where boys thirteen and twelve years old, respectively, testified for their mother in her suit for separation, Dr Laushington said: "I must bear in mind that these children are separated from the father and under the control of the mother. I have to guard, therefore, against an almost unavoidable bias, and also against the liability to error incident to witnesses of so early an age." 1 Spinks Ecc. & Adm. 196, 204.

## CHAPTER 79

### Of Counsel or Attorney as Witness

It is contrary to professional ethics for an attorney to become a witness for his client without first entirely withdrawing from any further connection with the case. 36 Atl. Rep. 38. An attorney in the cause should never testify when the facts he is expected to disclose can be proved by other witnesses. 82 Ark. 432, 102 S. W. Rep. 690-693. Those gentlemen of the bar who habitually suffer themselves to be used as witnesses for their clients soon become marked both by their associates and the Courts, and forfeit in character more than will ever be compensated to them by success in such clients' controversies. 1 Sandf. (N. Y.) 607, 609.

It is always desirable, for the harmony of the profession, the independence of the bench, and the public confidence in the administration of justice, that an attorney should not be a witness except in extreme cases, when all other means of proof are impossible; and then, as it seems to us, the attorney should withdraw from professional participation in the cause. So far as the bench is concerned, it is a duty of the most painful nature to be called upon as we sometimes have been, to weigh the evidence of a member of the bar." 2 La. Ann. 923. It is a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witness. 8 Pa. St. 521. Testimony by an attorney in the cause to admissions made to him by the opposite party is always regarded with extreme suspicion and distrust by both Courts and juries. 1 Sandf. (N. Y.) 608, 609.

The zeal of the advocate is very likely to influence the statement of the witness and to lead him unconsciously to merge the character of the one into that of the other. 79 Ill App. 263, 265. Where counsel in a will case testified to his opinion of the testamentary capacity of the testator, the Court said his testimony "must be discounted by the



unconscious influence of a desire for victory, which naturally shades the opinions of any witness who is at the same time counsel in the cause." 49 Atl. Rep. 819. "A barrister should not accept a retainer in a case in which he has reason to believe he will be a witness, and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardising his client's interests. Nor should counsel accept a brief before an appellate tribunal when he has been witness in the Court below." See Rules of General Conduct of Bar.

Under S. 118 of the Evidence Act counsel though engaged in a case are competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainers. At the same time, as a general practice it is undesirable when the matters to which the counsel depose is other than formal, that they should testify either for or against the party whose case they are conducting. If counsel knows or has reason to believe that he will be an important witness in a case, he ought not to accept retainer therein. 40 C. 898. See 29 I. C. 135 : 17 M L T, 382 ; See 4 Dowl & L. 393.

An American Judge once said "He was his client's chief witness and his testimony is saturated with the bias, prejudice, and zeal in his client's behalf justifiable in counsel, but unworthy in a witness." 20 (N. Y.) Supp. 82. The following decisions of our High Courts will be found useful :— Though a person may be both advocate and witness in the same suit, but such a course is most strongly disapproved 40 C. 898, 29 I. C. 135. It is improper for a counsel to appear in a case in which he may have to give evidence or in which he may be personally interested. 1925 S. 99 : 25 Cr. L. J. 571, 1930 L. 361, 1933 R. 34, 1927 P. 61 : 101 I. C. 289, 40 C. 898. Calling a pleader for the accused as prosecution witness in the middle of a case is reprehensible. Trial is vitiated whether accused is prejudiced or not. 1925 M. 1153 : 51 I. C. 65 : 27 Cr. L. J. 33. No self-respecting counsel would like to conduct a case for the defence after having been called as a witness for the prosecution. 1925 M. 1153 : 91 I. C. 65. A pleader merely called to give evidence as to what had occurred in a previous suit in which he was engaged as a pleader, cannot be allowed special fees. 46 B. 89. If accused's counsel is to be produced as witness he should not be excluded from the Court room, but should be allowed to conduct and plead. 44 M. 916. A counsel may make a statement, robed, from the Bar, without being sworn on any matter within his knowledge in connection with a case. But, if he does not avail himself of this privilege, he can give evidence from the witness-box unrobed and on oath. Taylor, S. 1381. 1923 M. 690, 3 C. W. N. 694. But see 27 C. 428.

## CHAPTER 80

### Of Court Witness or Upon Answers to Court Questions.

In civil cases and criminal trials, the Judge has the power to summon Court witnesses and examine them as such. See S. 540, Cr. P. C., O. XVIII, r. 17, C. P. C. The question arises, whether parties have a right to cross-examine such witnesses. It has been held in a number of decisions that right to cross-examine exists. But there is no right of cross-examination upon answers in reply to questions by Court. See S. 165, Ev. Act. The following decisions may be noted :—

Both sides have a right to cross-examine a witness freely. Questions suggested to Magistrate and put by him is no cross-examination. 24 C.



5 C. 614, 47 A. 147. 1931 B 413. Cross-examination of Court witness need not be restricted to the points on which he has been examined by the Court. 35 C. 243. A defence witness was given up by accused. The Court examined him as Court witness. The accused has a right to cross-examine him, 29 C. 387, but not without leave of Court. 11 B. H. C. R. 166. Court should inform the parties of the names of witnesses beforehand, so that they may prepare the cross-examination. 10 L. 790 : 1929 Lah. 120.

## CHAPTER 81

### Of Deaf and Dumb Witnesses

S. 119, Evidence Act provides that : "A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs ; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence."

Judges formerly held that deaf and dumb persons from their birth were idiots, but this presumption is certainly no longer recognized, as persons afflicted with these calamities have been found, by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed. Still, when a deaf mute is adduced as a witness, the Court, in the exercise of due caution, will take care to ascertain before he is examined that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. When the Judge is satisfied on these heads, the witness may be sworn and give evidence through an interpreter by means of the deaf and dumb alphabet of signs, and this the usual modern practice. If he is able to communicate his ideas perfectly by writing, he may be required to adopt that as the more satisfactory method, but if his knowledge of that method is imperfect, he may be permitted to testify by means of signs. See Taylor, S. 1376 (b). A witness who is deaf cannot give evidence *viva voce*. He may, therefore, give evidence in Court in any manner in which he can make it intelligible, e.g., by writing, or by signs. He must, however, be a competent witness, i.e., he must possess the requisite degree of intelligence to understand and answer the questions in a rational manner. If, therefore, he is unable to understand the questions or to make his meaning intelligible, he cannot be examined as a witness. See 14 I. C. 655. Signs made by a dying person in answer to questions put to him are admissible as statements. 7 A. 335 (F. B.). Where the deaf-mute could not understand the question that was put to him and could not make his meaning intelligible, it was held, that he was not a competent witness. 5 O. C. 246.

## CHAPTER 82

### Of Doctor or Medical Witness

A doctor or medical witness is very difficult witness to be cross-examined. No lawyer should take up the cross-examination of expert until he has efficient study on the subject of the cross-examination. There is a common tendency among experts especially in medical surgery, and mental diseases, to exaggerate conditions by giving some high-sounding name to simple affection, known to the ordinary person by some simple designation, and also to give undue significance to little things which are unnoticed as they occur in the ordinary affairs of the life, e.g., an old man whose will was in contest had a poor memory, therefore he had *senile dementia*, but a thousand businessmen are daily forgetting to attend to some simple details

of business forgetting, perhaps, names of their customers with whom they have weekly or monthly transactions and yet they are considered successful in the business world.

**Difficulties in Cross-examination of Doctors.** There are three main difficulties in cross-examining a medical witness:—It is generally found that medical experts take extremely partial view of the case. They are biased in favour of the party for whom they appear. Lord Campbell said that 'hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked.'

Mr. Taylor in his treatise on the "Law of Evidence" says:—"Expert witnesses become so warped in their judgment by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of expressing a candid opinion."

"With all men, in all employments," said Judge Hammond, "benevolence and sympathy with those who seek a mere opinion upon subjects of expert knowledge dominate the judgment that is given. It is a human tendency, and is the weakness of all expert testimony." "Experts on both sides of a cause become too often eager attorneys before the trial is ended and before their testimony is given."

"Considerable experience has taught me," said Surrogate Calvin of New York, "that the testimony of experts who are selected by the party in whose behalf their testimony is to be given, and whose testimony in his favour is assured beforehand, are likely to be considerably influenced by the fact that the experts have been employed as such by the party calling them, and that, while on the stand, they are paid to have a theory, which they are zealous to maintain; and, as a general rule, they fall short of that impartiality which characterizes ordinary witnesses in Court; and this observation has led me to scrutinize with great care the testimony given under such circumstances, and, for this, I have the warrant of one of the most accomplished jurists of this country."

The opinion of the medical witness must not be taken on which party calls him as witness. 1925 C. 67 : 87 I. C. 534. The opinion of an expert is not infallible and he is likely to be partial to the party calling him. 1921 L. 126 : 59 I. C. 220, 1933 L. 561 : 144 I. C. 331. The Courts have come to a conclusion after sifting into the evidence of number of cases that expert evidence is generally prejudiced. See 1933 L. 561 : 34 Cr. L. J. 735. Where the evidence of a medical man is conflicting with other oral evidence, the Courts have laid down the following rules:—(1) Where the part assigned to the accused is falsified by the medical evidence, the accused must be given the benefit of doubt. 1927 L. 617 : 28 Cr. L. J. 685. (2) Where the opinion of the doctor was that the patient was incapable of doing a particular act next day and the eye-witnesses deposed to the contrary, held, that the hypothetical opinion of doctor should not prevail. 1924 Bom. 457 : 83 I. C. 616. (3) Opinion of medical man should not outweigh the testimony of respectable and disinterested eye-witnesses. 50 C. 100, 1924 Bom. 457 : 83 I. C. 616. (4) Evidence of medical witness should not be considered as conclusive against the testimony of eye-witnesses. 1927 M. 996 : 28 Cr. L. J. 1007 : 11 W. R. Cr. 25. (5) Medical evidence should be used as corroborative evidence and not as evidence of charge. 1934 Pesh. 27 : 35 Cr. L. J. 961.

But it cannot be laid down as a general proposition that medical evidence is of less value than that of an eye-witness when the doctor

deposes as to the contents of the stomach and the food regurgitated into the larynx; it requires no expert to draw conclusions from those facts. The Judge himself can draw the conclusion, as well as the doctor as to the cause of death. 1929 O. 248 : 31 Cr. L. J. 181. In many countries expert testimony is invested with a sort of semi-official authority and special rules are laid down for the estimation of its probative force. See Mittermaler, *Traite de la Preuve*, C. 26. Our High Courts have also held that Courts should not accept blindly medical evidence. 1924 B. 457 : 50 C. 100.

The second difficulty regarding testimony of medical witness is that he employs a difficult or technical language which is not understood by a layman or a lawyer. What is the use in telling the average juror, whether he be a farmer or a businessman or even an editor, that the plaintiff has *traumatic neurasthenia* without in some manner reducing it to English and getting it in condition so that it means something to the listener? It probably won't convince him of anything, except that the doctor wants to display his Latin; or to take another case :—"Anterior to the right parietal eminence, running parallel with the coronary suture into the squamous portion of the temporal bone, there is a fracture of the bone as long as and as wide as the finger. Its edges run parallel to each other, and are slightly arched with the convexity posterior; the anterior is sharp, the posterior depressed. On the inner surface of the skull the vitreous table is detached and the dura lacerated. In addition there was found between the latter and the internal meninges a thick layer of recent blood coagula." And what does a description of this kind signify to the average juror? "The dura matter was dissected away from this fracture and the vicinity by a large lentil-shaped blood coagulum, which occupied the entire left temporal region, extending into the middle fossa of the skull, pressing the dura inward, flattening the corresponding portion of the brain cortex, and displacing inward the latter with the lateral ventricle. The extravasated blood came from a rupture of the principal anterior branch of the middle meningeal artery, produced by the aforementioned fracture of the skull, which affected the sulcus in which the artery runs." Scientifically correct? Yes, but the expert is not talking in the clinic, he is talking to men who never saw a clinic, and he is trying to aid their untrained minds to see a condition as he saw it. Does language such as above quoted convey a clear image to these minds? Well, I can imagine the arguments of the men in their jury-room, as they talk in loud tones of the "dura" and the "customry suture" and the "squamous portion of the temporal bone" and the "lentil shaped blood coagulum" and of the "middle meningeal artery." But experts say these terms must be used. Perhaps so, but they should be used only with such plain explanation as they will convey a meaning to the minds they are intended for, and the expert who cannot make clear to these minds the facts and conditions which he is required to describe, should never get upon the witness stand." 1 Cr. L. J. 152 (Jour.).

It has been observed that there is a common tendency among medical witnesses to exaggerate conditions by giving some high sounding name to some simple affection, known to the ordinary person by some simple designation. If an old man whose will is in contest has a poor memory, the expression used will ordinarily be that he had *senile dementia*, but a thousand businessmen are daily forgetting the details of their business and the affairs of their regular customers, yet they are known to be successful in the business world.

The third difficulty regarding a medical witness is that he has a very limited knowledge on the subject he undertakes to testify upon and always tries to stick to his theory. He will try to give opinion on any hypothetical question and will not give the impression that he has no knowledge on the subject. In fact he has not learnt to say "I don't know."

"I don't know" is the hardest thing for some experts to say, and yet they don't know—in many, many cases they don't know. No men ever mastered all the knowledge in any of the sciences. Graveyards all over the country are eloquent with the statement "they don't always know." From the grated windows of the asylum come the hollow voices crying out "they don't always know." From the wrecked and bleeding victims of the fallen bridge but recently constructed by skilled engineers, comes the wail, "they don't always know." And from the dust-covered archives of the county clerk's office, where are recorded the proceedings in some case in which, through an error of some lawyers, injustice was done and right was defeated, come the sad refrain, "they don't always know."

Human nature is weak, the powers of the mind are limited, the most tireless investigator in the field of science may spend his youth and manhood and declining years in faithful search for the great truths of nature, and at the end he will lay down his microscope and feel that his work is but half done. The astronomer takes you to his mighty telescope and lets you gaze at the myriads stars which dazzle the eye with their brilliance and you will say, "Wonderful! Wonderful!" but he will tell you that beyond the vision of the largest telescope ever constructed there are a thousand times more stars which the eye of man has never beheld. The geologist will dig down into the earth thousands of feet and there upon the pages of the rock he will read the history of a buried world, and as you stand in awe and wonder, he will tell you that hundred and thousands of feet below the deepest excavations are stories never yet read by the human mind known only to the Infinite. The alienist will take the wonderful brain of man and will point out to you the centres of power and action and speech and sight, but when you ask him to tell you wherein lie the powers to think and reason and will, he shakes his head and says: "We do not know." The anatomist takes the wonderful human body and numbers for you the nerves, the veins the arteries, the drops of blood and the heart beats, but when you point to the vermiform appendix—he changes the subject. No, they do not always know, and one of the first things which an expert should learn to say, is "I do not know." 1 Cr. L. J. 149—157.

As regards mistakes of the Doctor, the following funny instance, though often true may be noticed:—

A lawyer examining a doctor as an expert witness put the following questions to the doctor:—

Q. "Doctors sometimes make mistakes, don't they?"

A. "The same as lawyers," was the reply.

Q. "But doctors' mistakes are buried six feet underground."

A. "Yes," said the doctor, "and lawyers' mistakes sometimes swing six feet in the air." See 15 M. L. J. 370.

Dr. Taylor has given a sound advice to the medical witnesses in the following words:— (1) "That he should be well prepared on all parts of the subject on which he is about to give evidence." (2) "That his demeanour should be that of an educated man, and suited to the serious occasion on

which he appears, even although he may feel himself provoked or irritated by the course of examination adopted. Nothing can tend more to lower a witness in the opinion of the Court and jury, or diminish the value of his evidence, than the manifestation of a disposition to deal with his examiner as if he were a personal enemy, to evade the questions put, or to answer them with flippancy or anger." 6 C L. J. 17.

**Cross-examination as to Age :—**The evidence of a medical expert as to age of a person is not conclusive. He can make a mistake to the extent of two years this way or that way.

The data for determining the age of a person, may be summarized thus :—Age can be determined by teeth, by hair on pubes and armpits, by height, breast development, by ossification, by X-Rays. etc. See Prem's Laws of India, pp. 323-324.

The Privy Council has laid down that the certificate of doctor as to age is valueless. 21 C. W. N. 257 (P. C.). A certificate that a person was 21, by a doctor who formed his opinion "judging by his voice and his teeth" is worthless 21 C. W. N. 257 (P. C.) : 39 I. C. 401 : 1916 P. C. 242. Medical evidence as to age is from its very nature based on conjectures and cannot be relied on to determine with precision the exact age of a person 1928 L. 250 : 113 I. C. 53, 1931 L. 401 : 32 Cr. L. J. 1041 : 133 I. C. 560. A certificate as to the age of a private patient does not fall within S. 35, Ev. Act. It is not an entry in a public document in the performance of duty. 33 I. C. 142. Where a Civil Surgeon reports about the probable age of a person to a magistrate on the latter's requisition, he is merely giving his expert opinion and is not making a record of his act in his official capacity for the public and the report so made is not a public document. 1928 Oudh 155 : 108 I. C. 817. No medical witness can testify to exact age of minor, as it is always possible for medical testimony to err within a year or two of the correct age. 1 Weir 373, (374). If there is a difference of two or three years only, it is impossible for a medical man on ordinary inspection to state with any degree of certainty the exact age of a person. A. L. R. 1932 L. 440 : 1932 P. C. L. 440 Cr. The effect of medical evidence is to render other evidence as to age of person probable or improbable. 56 I. C. 313. After adult life is reached, the age can be guessed approximately. Lyon's Med. Jur., 1904, Pp. 34-35. As regards age of child, layman, e.g., mother is better authority than a doctor. Lyon's Med. Jur., 1935, p. 83.

**Hypothetical Questions to a Medical Witness :—**The Courts have laid down that hypothetical opinion of a doctor should not prevail against the evidence of an eye-witness. 1924 Bom 457 : 83 I. C. 416. Where the opinion of the doctor was that the patient was incapable of doing a particular act next day and the eye-witnesses deposed to the contrary, it was held that the hypothetical opinion of the doctor should not prevail. 1924 Bom. 457. The hypothetical question as presented is usually and wonderfully made. The rule of practice permits the lawyer to frame his question so that it will present the most favourable view of the most favourable part of the facts which the evidence has a tendency to prove. The result is an exaggerated and unwarranted picture which would never be recognized in the world as the person or condition involved in the inquiry. I think the Court should be given more latitude in determining what the form of the hypothetical question should be, and that no hypothetical questions should be permitted except those which fairly present the whole facts favourable, and unfavourable just as they occurred upon the trial. 1. C. L. J. 149—157.

An hypothetical question is supposed to be an accurate synopsis of the testimony that has already been sworn to by the various witnesses who have preceded the appearance of the medical expert in the case. The expert is then asked to assume the truth of every fact which counsel has included in his question and to give the jury his opinion and conclusions as an expert from these supposed facts. The cross-examining counsel must try and minimize the injurious effect of such hypothetical questions. One useful method is to rise and demand of physician that he repeats, in substance the question that had just been put to him and upon which he bases his answer. The stumbling effort of the witness to recall the various stages of the question (such questions are usually very long) opens the eyes of the jury at once to the dangers of such testimony. Wellman, p. 90.

The question should not be so framed as to allow the witness to form a critical review of the testimony of other witnesses and to draw inferences or conclusions therefrom. In a case (*R. v. Frances*, 4 Cox. C. C. 57) Alderson and Cheswell, JJ. refused to allow a witness to be asked whether, from all the evidence he had heard, both for the prosecution and defence, he was of opinion that the prisoner at the time he committed the act was of sound mind; and said the proper mode is to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true to ask whether they indicate insanity on the part of the prisoner. Wills, *Cir. Ev.*, 6th Ed., p. 157.

The scope of hypothetical questions to experts has been debated upon in many cases and it is not easy to formulate any inflexible rule capable of application in all cases. As a rule, an expert cannot be asked the very question which the Judge or the jury has to decide, unless the issue is one of science and he has *himself* observed the facts. Tindal, C. J., once said: "The question lastly proposed by your Lordships is 'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusions at the time?' In answer thereto we state to your Lordship that we think the medical man, under the circumstances supposed, cannot in strictness be asked the opinion in the terms above stated because each of those questions involves the determination of the truth of the facts deposed to, which it is for jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of the science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted as a matter of right." *Rex v. MacNaghten*, 10 Cl. & F. 200, 212.

Phipson has summarised the law thus after reviewing numerous decisions: "The cases are conflicting as to how far an expert may be asked the very question which the Judge or the jury have to decide; but the authorities appear to be as follows:—(i) Where the issue involves other elements beside purely scientific, the expert must confine himself to the latter, and must not give his opinion upon the legal or general merits of the case (ii) Where the issue is substantially one of science or skill merely, the expert may, if he has *himself* observed the facts, be asked the very question which the jury have to decide. (iii) If, however, his opinion is based merely upon facts proved by others, such a question is improper, for it practically asks him to determine the truth of their testimony, as well as to give an opinion upon it; the correct course

is to put such facts to him *hypothetically* and not *en bloc* asking him to assume one or more of them to be true, and to state his opinion thereon. Phipson, pp. 391-392.

"As a general thing, it is unwise for the cross-examiner to attempt to cope with a specialist in his own field of enquiry. Lengthy cross-examinations along the lines of the expert's theory are equally disastrous and should rarely be attempted. The hypothetical question is generally couched in language, the purport of which it is difficult of understand. It is generally a compound and complicated one, *e. g.*—"When Nathan M. Morse was trying the Tokerman Will Case before Judge Mckim. Dr. Jelley, the well-known expert on insanity, was one of the witnesses. One of the hypothetical questions asked of the witness by Mr. Morse contained not less than 20,000 words. The lawyer started this pithy question at the opening of Court and closed only a few minutes prior to the noon adjournment. The point that Mr. Morse was endeavouring to bring out related to the mental condition of the testator when he made his will." 17 M. L. J. 31 (Jour.).

**Stage for examination of Doctor:**—Medical witness should not be examined at the early stage of the case as it is impossible to realize on what point his opinion is necessary. 1941 R. 209=43 Cr. L. J. 157.

#### Illustrations.

(i) In answer to the long hypothetical question of the attorney who called a doctor, one Mr. Thompson gave it as his opinion that the testator was afflicted with "senile dementia." Across the room sat a young attorney on the opposite side with a formidable battery of medical books close to hand. It was his duty to cross-examine the expert and to show his opinion was at variance with the books. In varying forms the same questions were asked and re-asked at wearisome length. Dr. Thompson stood the ordeal without complaint until nearly midnight. Then the following question was put :

Q. "Doctor, you have given it as your judgment that the testator was suffering from what you are pleased to term 'senile dementia' Now I wish you would repeat to this jury some of the evidences of 'senile dementia' in a patient."

A, "Well, the books say, when a man has 'senile dementia,' one of the symptoms is to ask the same question over and over again after it has been clearly answered."

No doubt it might not have been proper for the counsel to repeat the same question over and over again. But it is the function of the Court to see whether such repetition is to be allowed or not. It was no business of the witness to make such an answer as the above. 25 M. L. J. p. 81.

(ii) "Some two years ago I was in New York City, overlooking the taking of some depositions in the case of a lady who had instituted a damages suit against the railway company by which I was employed. She lived in Tennessee, and was travelling through Virginia. There had been a heavy rain that had washed a lot of sand down upon the track. The locomotive ran upon this sand and quietly and sweetly turned over. Nobody was hurt so far as we could tell except this lady. For many years she had been under treatment for some ailment to one of her limbs. She was on the way to her specialist in New York then, for further treatment of this limb. It was the deposition of this specialist that we were taking. Our counsel in charge of the case was conducting



the cross-examination. Our counsel went on and developed her condition before as being very similar to that in which she was at present, in the fact that she had been on her way to her doctor for treatment at the time of the accident complained of. The witness testified all right as to what the condition of this good lady was ; our counsel turned to me by way of consultation and said in a low voice.

"The other side did not ask him whether or not her present condition is due to the turning over of that car, or whether it was due to the old ailment. Shall I ask him?"

"No, do not do it."

"Yes," he said, "I think I had better ; I think I shall. I believe that will end the law suit." "So do I," I replied.

"Well," said he, "he is obliged to say it, he is obliged to say it."

"Remember he is her doctor, he has been getting her money. I believe it a fine question to ask, but I would sooner ask it of the jury. The jury cannot explain it like that doctor can." But still he insisted. "Well, I will take the responsibility," he added.

"Very well, you are in charge. Ask it and then will come to deluge." I told him, So he asked the question and the doctor said :—

"Yes, she had that ailment, but I thought she was completely cured of it. She was so severely shaken in this accident that it has turned the whole thing loose worse than ever."

That was a fine question, a very learned question. It was a costly question for I turned back home and paid her £10,000 damages. 14 Cr. L. J. p. 28.

(iii) Dr. Buchanan was charged with the offence of having poisoned his wife—a woman considerably older than himself, and who had made a will in his favour—with morphine, and with atropine, each drug being used in such proportion as to effectually obliterate the group of symptoms attending death when resulting from the use of either drug alone.

At Buchanan's trial the district attorney found himself in the extremely awkward position of trying to persuade a jury to decide that Mrs. Buchanan's death was, beyond all reasonable doubt, the result of an overdose of morphine mixed with atropine administered by her husband, although a respectable physician, who had attended her at the death-bed, had given it as his opinion that she died from natural causes and had himself made out a death certificate in which he attributed her death to apoplexy.

It was only fair to the prisoner that he should be given the benefit of the testimony of this physician. The district attorney, therefore, called the doctor to the witness-stand and questioned him concerning the symptoms he had observed during his treatment of Mrs. Buchanan just prior to her death and developed the fact that the doctor had made out a death certificate in which he had certified that in his opinion apoplexy was the sole cause of death. The doctor was then turned over to the lawyers for the defence for cross-examination. In such a case one would suppose that no questions were necessary in cross-examination.

But the counsel for the defence put this most irrelevant and dangerous question to the witness. "Now Doctor you have told us what this lady's symptoms were, you have told us what you then believed was the



cause of her death. I now ask you, has anything transpired since Mrs. Buchanan's death which would lead you to change your opinion as it is expressed in this paper?"

The Doctor having heard the question read a second time, paused for a moment, and then straightening himself in his chair turned to the cross-examiner and said, "I wish to ask you a question. Has the report of the chemist telling of his discovery of atropine and morphine in the contents of this woman's stomach been offered in evidence yet?" The Court answered, "It has not."

"One more question," said the Doctor, "Has the report of the pathologist yet been received in evidence?" The Court replied, "No."

"Then" said the Doctor, rising in his chair, "I can answer your question truthfully, that, as yet, in the absence of the pathological report and in the absence of the chemical report, I know of no legal evidence which would cause me to alter the opinion expressed in my death certificate."

(iv) See illustration (i) in ch. 13 *supra*.

(v) See illustration (iv) in ch. 64 *supra*.

(vi) Carlyle Harris was a gentleman's son, with all the advantages of education and breeding. In his twenty-second year, and just after graduating with Honours from the College of Physicians and Surgeons in New York City, he was indicted and tried for the murder of Miss Helen Potts, a young, pretty, intelligent and talented school girl in attendance at Miss Day's Ladies Boarding School, on 4th Street, New York City. Harris had made the acquaintance of Miss Potts in the summer of 1889, and all during the winter paid marked attention to her. The following spring, while visiting her uncle, who was a doctor, she was delivered of a four months' child, and was obliged to confess to her mother that she was secretly married to Harris under assumed names, and that her student husband had himself performed an abortion upon her. Harris was sent for. He acknowledged the truth of his wife's statements, but refused to make the marriage public. From this time on, till the day of her daughter's death, the wretched mother made every effort to induce Harris to acknowledge his wife publicly. She finally wrote to him on the 20th of January, 1891, "You must go on the 8th of February, the anniversary of your secret marriage, before a minister of the Gospel, and there have a Christian marriage performed—no other course than this will any longer be satisfactory to me or keep me quiet." That very day Harris ordered at an apothecary store six capsules, each containing  $4\frac{1}{2}$  grains of quinine and  $\frac{1}{2}$  of a grain of morphine, and had the box marked: "C. W. H. Student. One before retiring." Miss Potts had been complaining of sick headaches, and Harris gave her four of these capsules as an ostensible remedy. He then wrote to Mrs. Potts that he would agree to her terms "unless some other way could be found of satisfying her scruples," and went hurriedly to Old Point Comfort. Upon hearing from his wife that the capsules made her worse instead of better, he still persuaded her to continue taking them. On the day of her death she complained to her mother about the medicine Carlyle had given her, and threatened to throw the box with the remaining capsule out of the window. Her mother persuaded her to try this last one which she promised to do. Miss Potts slept in a room with three classmates, who on this particular night, had gone to a symphony concert. Upon their return they found Helen sleep, but woke her up and learned from her that

she had been having "such beautiful dreams," she "had been dreaming of Carl." Then she complained of feeling numb, and becoming frightened, begged the girls not to let her go to sleep. She repeated that she had the medicine Harris had given her, and asked them if they thought it possible that he would give her anything to harm her. She soon fell into a profound coma, breathing only twice to the minute. The doctors worked over her for eleven hours without restoring her consciousness, when she stopped breathing entirely. The autopsy, fifty-six days afterwards, disclosed an apparently healthy body, and the chemical analysis of the contents of the stomach disclosed the presence of morphine but not of quinine, though the capsules as originally compounded by the druggist contained twenty-seven times as much quinine as morphine.

This astounding discovery led to the theory of the prosecution that Harris had emptied the contents of one of the capsules, had substituted morphine in sufficient quantities to kill, in place of the  $4\frac{1}{2}$  grains of quinine (to the eye, powdered quinine and morphine are identical), and had placed this fatal capsule in the box with the other three harmless ones, one to be taken each night. He had fled from the city, not knowing which day would brand him a murderer.

Immediately after his wife's death Harris went to one of his medical friends and said: "I only gave her four capsules of the six I had made up; *the two I kept out will show that they are perfectly harmless. No jury can convict me with those in my possession; they can be analysed and proved to be harmless.*" They were analysed and it was proved that the prescription had been correctly compounded. But often times the means a criminal uses in order to conceal his deed are the very means that Providence employs to reveal the sin that lies hidden in his soul. Harris failed to foresee that it was the preservation of these capsules that would really convict him. Miss Potts had taken all that he had given her, and no one could ever have been certain that it was not the druggist's awful mistake, had not these retained capsules been analysed. When Harris emptied one capsule and re-loaded it with morphine, *he had himself become the druggist.* It was contended that Harris never intended to recognize Helen Potts as his wife. He married her in secret, it appeared at the trial,—as it were from his own lips through the medium of conversation with a friend—"because he could not accomplish her ruin in any other way." He brought her to New York, was married to her before an alderman under assumed names, and then having accomplished his purpose, burned the evidence of their marriage, the false certificate. Finally, when the day was set upon which he must acknowledge her as his wife, he planned her death.

The late Recorder, Frederick Symth, presided at the trial with great dignity and fairness. The prisoner was ably represented by John A. Taylor, Esq., and William Travers Jerome, Esq., subsequently District attorney of New York.

Mr. Jerome's cross-examination of Professor Withaus, the leading chemist for the prosecution, was an extremely able piece of work, and during its eight hours disclosed an amount of technical information and research such as is seldom seen in our Courts. Had it not been for the witness's impregnable position, he certainly would have succumbed before the attack. The length and technicality of the examination render its use impracticable in this connection; but it may well be studied by all students of cross-examination who find themselves confronted with the task of examination

in so remote a branch of the advocate's equipment as a knowledge of chemistry.

The defence consisted entirely of medical testimony, directed towards creating a doubt as to the prosecution theory that morphine was the cause of death. Their cross-examination of our witnesses was suggestive of death from natural causes, from heart disease, a brain tumor, apoplexy, epilepsy, uremia. In fact, the multiplicity of their defences was a great weakness. Gradually they were forced to abandon all but two possible causes of death, that by morphine poisoning and that by uremic poisoning. This narrowed the issue down to the question: Was it a large dose of morphine that caused death, or was it a latent kidney disease that was superinduced and brought to light in the form of uremic coma by small doses of morphine, such as the one-sixth of a grain admittedly contained in a capsule Harris administered? In one case Harris was guilty; in the other he was innocent.

His direct testimony was to the effect that—basing his opinion partly upon wide reading of the literature on the subject, and what seemed to him to be the general consensus of professional opinion about it, and "*very largely on his own experience*"—no living doctor can distinguish the coma of morphine from that of kidney disease; and as the theory of the criminal law is that, if the death can be equally as well attributed to natural causes as to the use of poison, the jury would be bound to give the prisoner the benefit of the doubt and acquit him. If any of the jurors credited this testimony,—the witness gave the reasons for his opinion in a very quiet, conscientious, and impressive manner,—there certainly could be no conviction in the case, nothing better than a disgracement of the jury. It was certain Harris had given the capsule, but unless his wife had died of morphine poisoning, he was innocent of her death. It was apparent that the witness would stand any amount of technical examination, and easily get the better of the cross-examiner if such matters were gone into. He had made a profound impression. The Court had listened to him with breathless interest. He must be dealt with gently and, if possible, led into self-contradictions where he was least prepared for them.

The cross-examiner sparred for an opening with the determination to strike quickly and to sit down if he got in one telling blow. The first one missed aim a little, but the second brought a peal of laughter from the jury and the audience, and the witness retired in great confusion. Even the lawyers for the defence seemed to lose heart, and although two hours before time of adjournment, begged the Court for a recess till the following day.

The following extracts from the cross-examination of the doctor called in by the defence may well be noted:—

Q. (Quietly). "Do you wish the jury to understand, doctor, that Miss Helen Potts did not die of morphine poisoning?"

A. "I do not swear to that."

Q. "What did she die of?"

A. "I don't swear what she died of."

Q. "I understood you to say that in your opinion the symptoms of morphine could not be sworn to with positiveness. Is that correct?"

A. "I don't think they can, with positiveness."

Q. "Do you wish to go out to the world as saying that you have

never diagnosed a case of morphine poisoning excepting when he had an autopsy to exclude kidney disease?"

A. "I do not. I have not said so."

Q. "Then you have diagnosed a case on symptoms alone; yes? or no? I want a categorical answer."

A. (Sparring). "I would refuse to answer that question categorically; the word 'diagnosed' is used with two different meanings. One has to make what is known as a 'working diagnosis' when he is called to a case, not a 'positive diagnosis'."

Q. "When was your last case of opium or morphine poisoning?"

A. "I can't remember which was the last."

Q. (Seeing an opening). "I don't want the name of the patient. Give me the date approximately, that is, the year—but under oath."

A. "I think the last was some years ago."

Q. "How many years ago?"

A. (Hesitating). "It may be eight or ten years ago."

Q. "Was it a case of death from morphine poisoning?"

A. "Yes, sir."

Q. "Was there an autopsy?" A. "No, sir."

Q. "How did you know it was a death from morphine, if, as you said before, such symptoms cannot be distinguished?" A. "I found out from a druggist that the woman had taken seven grains of morphine."

Q. "You made no diagnosis at all until you heard from the druggist?"

A. "I began to give artificial respiration."

Q. "But that is just what you would do in a case of morphine poisoning?" A. "Yes. I made, of course, a working diagnosis."

Q. "Do you remember the case you had before that?"

A. "I remember another case."

Q. "When was that?"

A. "It was a still longer time ago. I don't know the date."

Q. "How many years ago, on your oath?" A. "Fifteen, probably."

Q. "Any others?" A. "Yes, one other."

Q. "When?" A. "Twenty years ago."

Q. "Are these three cases all you can remember in your experience?"

A. "Yes, sir."

Q. (Chancing it). "Were more than one of them deaths from morphine?" A. "No, sir, only one."

Q. (Looking at the jury somewhat triumphantly). "Then it all comes down to this: you have had the experience of one case of morphine poisoning in the last twenty years?"

A. (In a low voice). "Yes, sir, one that I can remember."

Q. (Excitedly). "And are you willing to come here from Philadelphia, and state that the New York doctors who have already testified against you and who swore they had had seventy-five similar cases in their own practice,

are mistaken in their diagnosis and conclusions?"

A. (Embarrassed and in a low tone). "Yes, sir, I am."

Q. "You never heard of Helen Potts until a year after her death, did you?" A. "No, sir."

Q. "You heard these New York physicians say that they attended her and observed her symptoms for eleven hours before death?" A. "Yes."

Q. "Are you willing to go on record, with your one experience in twenty years, as coming here and saying that you do not believe our doctors can tell morphine poisoning when they see it?" A. "Yes."

Q. "You have stated, have you not, that the symptoms of morphine poisoning cannot be told with positiveness?" A. "Yes."

Q. "You said you based that opinion upon your own experience and it now turns out you have seen but one case in twenty years?"

A. "I also base it upon my reading."

Q. (Becoming almost contemptuous in manner). "Is your reading confined to your own book?" A. (Excitedly). "No, sir."

Q. "But I presume you embodied in your own book the results of your reading, did you not?" A. (A little apprehensively). "I tried to, sir."

It must be explained here that the attending physicians had said that the pupils of the eyes of Helen Potts were contracted to a pin-point, so much so as to be practically unrecognizable, and symmetrically contracted—that this symptom was the one invariably present in coma from morphine poisoning, and distinguished it from all other forms of death, whereas in the coma of kidney disease one pupil would be dilated and the other contracted; they would be unsymmetrical.

Q. (Continuing). "Allow me to read to you from your own book on page 166, where you say (reading). 'I have thought that inequality of the pupils—that is, where they are not symmetrically contracted,—is proof that a case is not one of narcotism—of morphine poisoning—but Professor Taylor has recorded a case of morphine poisoning in which it (the unsymmetrical contraction of the pupils) occurred.' Do I read it as you intended it?"

A. "Yes, sir."

Q. "So until you heard of the case that Professor Taylor reported, you had always supposed symmetrical contraction of the pupils of the eye to be the distinguishing symptom of morphine poisoning, and it is on this that you base your statement that the New York doctors could not tell morphine poisoning positively when they see it?" "Yes, sir."

Q. (Very loudly). "Well, sir, did you investigate that case far enough to discover that Professor Taylor's patient had one glass eye?"

A. "I have no memory of it."

Q. "That has been proved to be the case here. You had better go back to Philadelphia, sir."

There were roars of laughter throughout the audience as counsel resumed his seat and the witness walked out of the court-room. It is difficult to reproduce in print the effect made by this occurrence, but with the retirement of this witness the defendant's case suffered a collapse from which it never recovered. See Wellman, pp. 310—321.

(vii) A very prominent physician, advised a woman who had been

his house-keeper for thirty years, and who had broken her ankle in consequence of stepping into an unprotected hole in the street pavement, to bring suit against the city corporation to recover very heavy damages. There was very little defence to the principal cause of action: the hole in the street was there, and the plaintiff had stepped into it; but her right to recover substantial damages was vigorously contested.

Her principal, in fact her only medical witness, was her employer, the famous physician. The doctor testified to the plaintiff's sufferings, described the fracture of her ankle, explained how he had himself set the broken bones and attended the patient, but affirmed that all his efforts were of no avail, as he could bring about nothing but a most imperfect union of the bones, and that his house-keeper, a most respectable and estimable lady, would be lame for life. His manner on the witness-stand was exceedingly dignified and frank, and evidently impressed the jury. A large verdict was certain to be the result unless the witness's hold upon the jury could be broken on his cross-examination. There was no reason known to counsel why this ankle should not have healed promptly, as such fractures usually do; but how to make the jury realize the fact was the question. The intimate personal acquaintance between the cross-examiner and the witness was another embarrassment.

The following cross-examination was conducted, in the most amicable manner possible, each question being asked in a tone almost of apology.

Q. "We all know, doctor, that you have a large and lucrative family practice as a general practitioner; but is it not a fact that in this great city, where accidents are of such common occurrence, surgical cases are usually taken to the hospitals and cared for by experienced surgeons?"

A. "Yes, sir, that is so."

Q. "You do not even claim to be an experienced surgeon?"

A. "Oh, no sir. I have the experience of any general practitioner."

Q. "What would be the surgical name for the particular form of fracture that this lady suffered?"

A. "What is known as a Potts' fracture of the ankle."

Q. "That is a well-recognised form of fracture, is it not?" A. Yes.

Q. "Would you mind telling the jury about when you had a fracture of this nature in your regular practice, the last before this one?"

A. "I should not feel at liberty to disclose the names of my patients."

Q. "I am not asking for names and secrets of patients—far from it. I am only asking for the date, doctor; but on your oath."

A. "I couldn't possibly give you the date, sir."

Q. "Was it within the year preceding this one?"

A. "I would not like to say, sir."

Q. "I am sorry to press you sir, but I am obliged to demand a positive answer from you whether or not you had had a similar case of 'Potts' fracture of the ankle' the year preceding this one?"

A. "Well, no, I cannot remember that I had."

Q. "Did you have one two years before?" A. "I cannot say."

Q. "Did you have one within five years preceding the plaintiff's case?" A. "I am unable to say positively."

Q. "Will you swear that you ever had a case of 'Potts' fracture' within your own practice before this one? I tell you frankly, if you say you have, I shall ask you day and date, time, place and circumstances."

A. (Much embarrassed) "Your question is an embarrassing one. I should want time to search my memory."

Q. "I am only asking you for your best memory as a gentleman, and under oath."

A. "If you put it that way, I will say I cannot now remember of any case previous to the one in question, excepting as a student in the hospitals."

Q. "But does it not require a great deal of practice and experience to attend successfully so serious a fracture as that involving the ankle joint?"

A. "Oh, yes."

Q. "Well doctor, speaking frankly, won't you admit that 'Potts' fractures' are daily being attended to in our hospitals by experienced men, and the use of the ankle fully restored in a few months' time?"

A. "That may be, but much depends upon the age of the patient; and again, in some cases, nothing seems to make the bones unite."

Q. (Taking up the lower bones of the leg attached and approaching the witness) "Will you please take these, doctor, and tell the jury whether in life they constituted the bones of a woman's leg or a man's leg?"

A. "It is difficult to tell sir."

Q. "What, can't you tell the skeleton of a woman's leg from a man's, doctor?" A. "Oh yes, I should say it was a woman's leg."

Q. "So, in your opinion, doctor, this was a woman's leg?" (It was a woman's leg.)

A. (Observing counsel's face and thinking he had made a mistake) "Oh, I beg your pardon, it is a man's leg of course. I had not examined it carefully."

Q. "Would you be good enough to tell the jury if it is the right leg or the left leg?"

A. "That is the right leg."

Q. (Astonished). "What do you say, doctor?"

A. "Pardon me, it is the left leg."

Q. "Were you not right the first time, doctor? Is it not in fact the right leg?"

A. "I don't think so; no, it is the left leg."

Q. (Bringing from under the table the bones of the foot attached together, and handing it to the doctor.) "Please put the skeleton of the foot into the ankle joint of the bones you already have in your hand and then tell me whether it is the right or left leg."

A. (Confidently) "Yes, it is the left leg, as I said before."

Q. (Uproariously) "But, doctor, don't you see you have inserted the foot into the knee joint? Is that the way it is in life?"

The doctor amid roars of laughter from the jury, in which the entire court-room joined, hastily re-adjusted the bones and sat blushing to the roots of his hair. Counsel waited until the laughter had subsided and then said quietly, "I think I will not trouble you further, doctor." The result was only normal damages. See Wellman, pp. 80-87.

(viii) In the summer of 1898 habeas corpus proceedings were instituted in New York to obtain the custody of a child. The question of the father's sanity or insanity at the time he executed a certain deed of guardianship was the issue in the trial. A well-known alienist, who for the past ten years has appeared in the New York Courts upon one side or the other in pretty nearly every important case involving the question of insanity, was retained by the petitioner to sit in Court during the trial and observe the actions, demeanour, and testimony of the father, the alleged lunatic, while he was giving his evidence upon the witness-stand. At the close of the father's testimony this expert witness was himself called upon to testify as to the result of his observation, and was interrogated as follows :—

Q. "Were you present in Court yesterday when the defendant in the present case was examined as a witness?" A. "I was."

Q. "Did you see him about the court-room before he took the witness-stand?"

A. "I observed him in this court-room and on the witness-stand on Monday."

Q. "You were sitting at the table here during the entire session?"

A. "I was sitting at the table during this examination."

Q. "You heard all this testimony?" A. "I did."

Q. "Did you observe his manner and behaviour while giving his testimony?" A. "I did."

Q. "Closely?" A. "Very closely."

Upon being shown certain specimens of the hand-writing of the defendant, the examination proceeded as follows :—

Q. "Now, doctor, assuming that the addresses as on these envelopes were written by the defendant some three or more years ago, and that the other addresses shown you and the signature attached thereto were written by him within the last year, and taking into consideration at the same time the defendant's manner upon the witness-stand, as you observed it, at his entire deportment while under examination, did you form an opinion as to his present mental condition?"

A. "I formed an estimate of his mental condition from my observation of him in the court-room and while he was giving his testimony and from an examination of these specimens of handwriting taken in connection with the observation of the man himself."

Q. "What in your opinion was his mental condition at the time he gave his testimony?"

*The Court.* "I think, doctor, that before you answer that question it would be well for you to tell us what you observed upon which you based your opinion."

A. "It appeared to me that upon the witness-stand the defendant exhibited a slowness and hesitancy in giving answers to perfectly distinct and easily comprehensible questions, which was not consistent with a sound mental condition of a person of his education and station in life. I noted a forgetfulness, particularly of recent events. I noted also an expression of face which was peculiarly characteristic of a certain form of mental disease; an expression of, I won't say hilarity, but a fatuous, transitory smile, and



exhibited upon occasions which did not call in my opinion for any such facial expression, and which to alienists possesses a peculiar significance. As regards these specimens of handwriting which I have been shown, particularly the signature to the deed, it appears to me to be tremulous and to show a want of co-ordinating power over the muscles which were used in making that signature."

In answer to a hypothetical question describing the history of the defendant's life as claimed by the petitioner, the witness replied :—

A. "My opinion is that the person described in the hypothetical question is suffering from a form of insanity known as paresis in the stage of dementia."

Upon the adjournment of the day's session of the Court, the witness was requested to take the deed (the signature to which was the writing which he had described as "tremulous" and on which he had based his opinion of demential) and to read it carefully overnight. The following morning this witness resumed the stand and gave it as his opinion that the defendant was in such a condition of mind that he could not comprehend the full purpose and effect of that paper.

The doctor was here turned over to defendant's counsel for cross-examination. Counsel jumped to his feet and taking the witness off his guard, rather gruffly shouted :—

Q. "In your opinion, what were you employed to come here for?"

A. (after hesitating a considerable time). "I was employed to come here to listen to the testimony of the defendant, the father of this child whose guardianship is under dispute"

Q. "Was that a simple question that I put to you? Did you consider it simple?"

A. "A perfectly simple question."

Q. (smiling). "Why were you so slow about answering it then?"

A. "I always answer deliberately; it is my habit."

Q. "Would that be an evidence of derangement in your mental faculties, Doctor,—the slowness with which you answer?"

A. "I am making an effort to answer you questions correctly."

Q. "But perhaps the defendant was making an effort to answer questions correctly the other day?"

A. "He was undoubtedly endeavouring to do so."

Q. "You came here for the avowed purpose of watching the defendant, didn't you?"

A. "I came here for the purpose of giving an opinion upon his mental condition."

Q. "Did you intend to listen to his testimony before forming any opinion?" A. "I did."

Q. (now smiling). "One of the things that you stated as indicating that disease of paresis was the defendant's slowness in answering simple questions, was't it, A. "It was."

Q. "No, in forming your opinion, you based it in part on his handwriting, did you not?" A. "I did, as I testified yesterday."

Q. 'And for that purpose you selected one signature to a particular instrument and threw out of consideration certain envelopes which were handed to you ; is that right ?'

A. "I examined a number of signatures, but there was only one which showed the characteristic tremor of paresis, and that was the signature to the instrument."

The witness was here shown various letters and writings of the defendant executed at a later date than the deed of guardianship.

Q. "Now, doctor, what have you to say to these later writings?"

A. "They are specimens of good handwriting. If you wish to draw it out, they do not indicate any disease—paresis or any other disease."

Q. "Do you think there has been an improvement in the defendant's condition meanwhile?"

A. "I don't know. There is certainly a great improvement in his handwriting."

Q. "It would appear, then, Doctor, that you selected from a large mass of papers and letters only one which showed nervous trouble, and do you pretend to say that you consider that as fair?"

A. "I do, because I looked for the one that showed the most nervous trouble, although it is true I found only one."

Q. "How many specimens of handwriting were submitted to you from which you made the selection?" A. "Some fifteen or twenty."

Q. "Doctor, you are getting a little slow in your answers again."

A. "I have a right ; my answers go on the record. I have a right to make them as exact and careful as I please?"

Q. (sternly). "The defendant was testifying for his liberty and the custody of his child ; he had a right to be a little careful ; don't you think he had?" A. "Undoubtedly."

Q. "You also expressed the opinion that the defendant could not understand or comprehend the meaning of the deed of guardianship that has been put in your hands for examination over-night?"

A. "That is my opinion."

Q. "What do you understand to be the effect of this paper?"

A. "The effect of that paper is to appoint, for a former legal consideration, Mrs. Blank as the guardian of defendant's daughter and to empower her and to give her all of the rights and privileges which such guardianship involves, and Mrs. Blank agree on her part to defend all suits for wrongful detention as if it were done by the defendant himself and the defendant empowers her to act for him as if it were by himself in that capacity. "That is my recollection."

Q. "What that paper really accomplishes is to transfer the management and care and guardianship of the child to Mrs. Blank. isn't it?"

A. "I don't know. I am speaking only as to what bears on his mental condition."

Q. "Do you know whether that is what the paper accomplishes?"

A. "I have given you my recollection as well as I can, I read the paper over once."

Q. "I am asking you what meaning it conveyed to your mind, because I am going to give the defendant that distinguished honour of contrasting his mind with yours"

A. "I should be very glad to be found inferior to his. I wish he were different."

Q. "When the defendant testified about that paper, he was asked the same question that you were asked, and he said 'I know it was simply a paper supposed to give Mrs. Blank the management and care of my child.' Don't you think that was a pretty good recollection of the contents of the paper from a man in the state of dementia that you have described?" A. "Very good."

Q. "Rather remarkable, wasn't it?"

A. "It was a correct interpretation of the paper."

Q. "If he could give that statement on the witness-stand in answer to hostile counsel, do you mean to say that he couldn't comprehend the meaning of the paper?"

A. "He was very uncertain, hesitating, if I recollect, about that statement. He got it correct, that's true."

Q. "Then it was the manner of his statement and not the substance that you are dealing with; is that it?"

A. "He stated that his recollection was not good and he didn't quite recollect what it was, but subsequently he made that statement."

Q. "Don't you think that it was remarkable for him to have been able to recollect from the seventh day of June the one great fact concerning this paper, to wit; that he had given the care and maintenance of his daughter to Mrs. Blank?" A. "He did recollect it."

Q. "It is a pretty good recollection for a dement, isn't it?"

A. "He recollected it."

Q. "Is that a good recollection for a man dement?" A. "It is"

Q. "Isn't it a good recollection for a man who is not a dement?"

A. "He recollected it perfectly."

Q. "Don't you understand, Doctor, that the man who can describe a paper in one sentence is considered to have a better mind than he who takes half a dozen sentences to describe it?"

A. "A great deal better mind."

Q. "Then the defendant rather out-distances you in describing that paper?" A. "He was very succinct and accurate."

Q. "And that is in favour of his mind as against yours?"

A. "As far as that goes."

Q. "Now we will take up the next subject, and see if I cannot bring the defendant's mind up to your level in that particular. The next thing you noticed, you say, was the slowness and hesitancy with which he gave his answers to perfectly distinct and easily comprehensible questions?"

A. "That is correct."

Q. "But you have shown the same slowness and hesitancy to-day haven't you?"

A. "I have shown no hesitancy; I have been deliberate."

Q. "What is your idea of the difference between hesitancy and deliberation, Doctor?"

A. "Hesitancy is what I am suffering from now; I hesitate in finding an answer to that question."

Q. "You admit there is hesitation; isn't that so?"

A. "And slowness is slowness."

Q. "Then we have got them both from you now. You are both slow and you hesitate, on your own statement; is that so, Doctor?"

A. "Yes."

Q. "So the defendant and you are quite akin on that; is that right?" A. "I admit no slowness and hesitancy, I am giving answers to your questions as carefully and accurately and frankly and promptly as I can."

Q. "Wasn't the defendant doing that?" A. "I presume he was."

Q. "What was the next thing that you observed besides his slowness and hesitancy do you remember?"

A. "You will have to refresh my memory."

Q. (quoting) "I noted a forgetfulness, particularly of recent event. You think the defendant is even with you now, on forgetfulness don't you?" A. "It looks that way."

Q. "You say further, 'I noted an expression of face which was peculiarly characteristic of a certain form of mental disease; I noted particularly an expression of I won't say hilarity, but a fatuous, transitory smile, on occasions which did not call, in my opinion, for any such facial expression. Would you think it was extraordinary that there should be a supercilious smile on the face of a sane man under some circumstances?" A. "I should think it would be very extraordinary."

Q. "Doctor, he might have had in mind the fact of the little talk you and I were to have this afternoon. That might have brought a smile to his face; don't you think so?" A. "I do not."

Q. "If as he sat there he had an idea of what I would ask you and what your testimony would be, don't you think he was justified in having an ironical expression upon his face?" A. "Perhaps."

Q. "It comes to this, then, you selected only one specimen of tremulous handwriting?" A. "I said so."

Q. "You yourself have shown slowness in answering my questions?"

A. "Sometimes."

Q. "And forgetfulness?" A. "You said so."

Q. "And you admit that any sane man listening to you would be justified in having an ironical smile on his face?" A. (No answer.)

Q. "You also admitted that the man you claim to be insane, gave from memory a better idea of the contents of this legal paper than you did although you had examined and studied it overnight?" A. "Perhaps."

Q. (Condescendingly). "You didn't exactly mean then that the

defendant was actually deprived of his mind?" A. "No, he is not deprived of his mind, and I never intended to convey any such idea."

Q. "Then, after all, your answers mean only that the defendant has not as much mind as some other person; is that it?"

A. "Well, my answers mean that he has paresis with mental deterioration, and, if you wish me to say so, not as much mind as some other people; there are some people who have more and some who have less."

Q. "He has enough mind to escape an expression which would indicate the entire deprivation of the mental faculties." A. "Yes"

Q. "He has enough of mind to write the letters of which you have spoken in the highest terms?" A. "I have said they were good letters."

Q. "He has enough mind to accurately and logically describe this instrument, the deed of guardianship, which he executed?"

A. "As I have described."

Q. "He probably knows more about his domestic affairs than you do. That is a fair presumption, isn't it?" A. "I know nothing about them."

Q. "For all that you know he may have had excellent reasons for taking the very course he has taken in this case?"

A. "That is not impossible; it is none of my affair" See Wellman, p. 105.

(x) One instance of perjured medical expert testimony was a doctor who had been the medical expert for the New York, New Haven and Hartford railroad for thirty-five years, for the New York Central railroad for twenty years and for the Erie railroad fifteen years. He was so great an expert that lawyers finally become afraid to cross-examine him. There was one lawyer, however, who was not afraid. The case was one in which a woman had sued the city for £ 50,000 damages, claiming she had been permanently injured by tripping over a street obstruction. Her counsel was ex-Chief Justice Noah Davis. Dr. Ranney, the famous expert, had been in daily attendance upon the woman for three years and testified he had examined her minutely 200 times. The city's medical experts declared the woman was only hysterical, but the jury evidently believed Dr. Ranney. The cross-examination was as follows:—

Counsel (quietly). "Are you able to give us, doctor, the name of any medical authority that agrees with you when you say that the particular group of symptoms existing in this case points to one disease and only one?"

Doctor. "Oh yes, Dr. Erskine agrees with me."

Q. "Who is Dr. Erskine, if you please?"

A. "Well," said the witness, with a patronizing smile, "Erskine is probably was one of the most famous surgeons that England has ever produced."

There was a titter in the audience at the expense of the lawyer.

Q. "What book has he written?"

A. "He has written a book called 'Erskine on the Spine,' which is altogether the best known work on the subject."

The titter around the court-room was becoming louder.

Q. "When was this book published?" asked the lawyer quietly.

A. "About ten years ago."

Q. "Well, how is it that a man whose time is so much occupied as you have told us yours is has leisure enough to look up medical authorities to see if they agree with him?"

A. "Well, Mr.—to tell you the truth," said the doctor, fairly beaming on the lawyer, "I have often heard of you, and I half suspected you would ask me some such foolish question; so this morning, after my breakfast, I took down from my library my copy of Erskine's book, and found that he agreed with me entirely."

This answer provoked a loud laugh at the expense of the lawyer. But the lawyer reached under the table and picked up his own copy of "Erskine on the Spine," and walking deliberately up to the witness, said:—

"Won't you be good enough to point out to me where Erskine adopts your view of the case?"

The famous doctor was visibly embarrassed.

"Oh, I can't do it now; it's a thick book," he said.

"But you forget, doctor, that thinking I might ask you some such foolish question you examined your volume of Erskine this morning after breakfast and before coming to Court."

The doctor showed his embarrassment plainly. Refusing to take the book, he said: "I have not time to do it now."

"Time!" thundered the lawyer. "Why, there is all the time in the world." The doctor gave no answer.

"I am sure the Court will allow me to suspend my examination until you shall have had time to turn to the place you read this morning in that book, and can re-read it aloud to the Jury."

There was absolute silence in the court-room for three minutes. The doctor wouldn't say anything, the plaintiff's attorney didn't dare say anything, and the lawyer for the defendant did not want to say anything. He saw that he had caught the famous witness in a manifest falsehood and that the doctor's whole testimony was discredited. After a few minutes more of this distressing silence, the presiding Judge Mr. Justice Barrett dismissed the witness and the whole case collapsed. See 15 M. L. J. 28-30 (Jour).

(xi) The following is another instance of cross-examination of a medical witness conducted many years ago by Gerritt A. Forbes of New York who afterwards became a Justice of the Supreme Court. "He was defending a woman charged with having murdered her by poisoning. The defence was that the deceased died from natural causes and it was sought to show that the post mortem examination had revealed a condition of the vital organs which made it impossible for any physician to determine with certainty the exact cause of death. The doctor who had conducted the post mortem testified that in his opinion death was caused by arsenical poison. Forbes drew out from him on cross-examination the general condition of the deceased as disclosed by the autopsy, and then asked if a man went under a tree during a thunderstorm, and that tree was struck by lightning, and if his dead body was afterwards found with marks of the electric fluid upon it, and also with a bullet through his brain, and a dagger through his heart, and if an autopsy showed the presence of poison, what, in your opinion, would be the cause of death. This line of defence proved successful, for, notwithstanding the

strong case presented by the prosecution, showing both opportunity and motive, the Jury rendered a verdict of acquittal. See 14 Cr. L. J. 21, (four).

(xii) Butler says in his autobiography :—When I was quite a young man I was called upon to defend a man for homicide. He and his associate had been engaged in a quarrel which proceeded to blows and at last to stones. My client, with a sharp stone struck the deceased in the head on that part usually called the temple. The man went and sat down on the curbstone, blood streaming from his face, and shortly afterwards fell over dead. "The theory of the Government was that he died from the wound in the temporal artery. My theory was that the man died of apoplexy and that if he had bled more from the temporal artery, he might have been saved—a wide enough difference in the theories of the cause of death." "Of course to be enabled to carry out my proposition I must know all about the temporal artery, its location, its functions, its capabilities to allow the blood to pass through it, and in how short a time a man could bleed to death through the temporal artery; also, how far excitement in a body stirred almost to frenzy in an embittered conflict, and largely under the influence of liquor on a hot day, would tend to produce apoplexy. I was relieved on these two points in my subject, but relied wholly upon the testimony of a surgeon that the man bled to death from the cut on the temporal artery from a stone in the hand of my client. That surgeon was one of those whom we sometimes see on the stand, who think that what they don't know on the subject of their profession is not worth knowing. He testified positively and distinctly that there was and could be no other cause for death except the bleeding from the temporal artery, and he described the action of bleeding and the amount of the blood discharged." "Upon all these questions I had thoroughly prepared myself."

The cross-examination was as follows :—

Q. "Doctor, you have talked a great deal about the temporal artery; now will you please describe it and its functions? I suppose the temporal artery is so called because it supplies the flesh on the outside of the skull, especially that part we call the temples, with blood."

A. "Yes; that is so."

Q. "Very well. Where does the temporal artery take its rise in the system? Is it at the heart?"

A. "No, the aorta is the only artery leaving the heart which carries blood toward the head. Branches from it carry the blood up through the opening into the skull at the neck, and the temporal artery branches from one of these."

Q. "Doctor, where does it branch off from it? On the inside or the outside of the skull?" A. "On the inside."

Q. "Does it have anything to do inside with supplying the brain?"

A. "No."

Q. "Well, doctor, how does it get outside to supply the head and temples?"

A. "Oh, it passes out through its appropriate opening in the skull."

Q. "Is that through the eyes?" A. "No."

Q. "The ears?" A. "No."

Q. "It would be inconvenient to go through the mouth, would it not, doctor?"

Here I produced from my green bag a skull.

"I cannot find any opening in the skull which I think is appropriate to the temporal artery. Will you please point out the appropriate opening through which the temporal artery passes from the inside to the outside of the skull?"

The doctor was utterly unable to do so.

"Doctor, I don't think I will trouble you any further; you can step down."

"He did so, and my client's life was saved on that point. The temporal artery doesn't go inside the skull at all." See Wellman, p. 200.

(xiii) The following incident is related by Mr. Butler in his autobiography:—"I had a young client who was on a railroad car when it was derailed by a broken switch. The car ran at considerable speed over the cross-ties for some distance, and my client was thrown up and down with great violence on his seat. After the accident, when he recovered from the bruising, it was found that his nervous system had been wholly shattered, and that he could not control his nerves in the slightest degree by any act of his will. When the case came to trial, the production of the pin by which the position of the switch was controlled, two-thirds worn away and broken off, settled the liability of the railroad for any damages that occurred from that cause, and the case resolved itself into a question of the amount of damages only. My claim was that my client's condition was an incurable one, arising from the injury to the spinal cord. The claim put forward on behalf of the railroad was that it was simply nervousness, which probably would disappear in a short time. The surgeon who appeared for the railroad claimed the privilege of examining my client personally before he should testify. I did not care to object to that, and the doctor who was my witness and the railroad surgeon went into the consultation room together and had a full examination in which I took no part, having looked into that matter before. "After some substantially immaterial matters on the part of the defence, the surgeon was called and was qualified as a witness. He testified that he was a man of great position in his profession. Of course in that I was not interested, for I know he could qualify himself as an expert. In his direct examination he spent a good deal of the time in giving a very learned and somewhat technical description of the condition of my client. He admitted that my client's nervous system was very much shattered, but he also stated that it would probably be only temporary. Of all this I took little notice; for, to tell the truth, I had been quite late the night before and in the warm court-room felt a little sleepy. But the counsel for the railroad put this question to him:—

"Doctor, to what do you attribute this condition of the plaintiff which you describe?"

"Hysteria, Sir; he is hysterical."

That waked me up. I said: "Doctor, did I understand—I was not paying proper attention—to what did you attribute this nervous condition of my client?"

"Hysteria, sir."

I subsided, and the examination went on until it came my turn to cross-examine. The cross-examination proceeded as follows:—



Q. "Do I understand that you think this condition of my client wholly hysterical?" A. "Yes, sir, undoubtedly."

Q. "And therefore it won't last long?"

A. "No, sir, not likely to."

Q. "Well, doctor, let us see; is not the disease called hysteria and its effects hysterics; and isn't it true that hysteria, hysierics, hysterical, all come from a Greek word?" A. "It may be."

Q. "Don't say it may, doctor; isn't it? Is it not an exact translation of the Greek word, which is the equivalent of the English word womb?" A. "You are right, sir."

Q. "Well, doctor, this morning when you examined this young man here, (pointing to my client), did you find that he had a womb?"

A. "I was not aware of it before, but I will have him examined over again and see if I can find it."

"That is all, doctor; you may step down." *Ibid.*

(xiv) In a case for damages against a railroad company, having made nothing out of the cross-examination of the doctor for the company, the plaintiff's lawyer threw these parting remarks at the witness:—

Q. "After all, isn't it a fact that nobody in your profession regards you as a surgeon?" A. "I never regarded myself as one."

Q. "You are a neurologist, aren't you, doctor?" A. "I am, sir."

Q. "A neurologist, pure and simple?"

A. "Well, I am moderately pure and altogether simple."

The sympathy of the Jury, it need scarcely be said, was altogether with the witness. See Wellman, p. 104.

(xv) In a suit for damages it was shown that the plaintiff had concussion of brain, loss of memory, bladder difficulties, a broken leg, nervous prostration, and constant pain in his back. And the attempt to alleviate the Pain attendant upon all these difficulties was gone into with great detail. To cap all, the attending physician had testified that reasonable value of his professional services was the modest sum \$ 2,500.

Counsel for the railroad, before cross-examining, had a critical examination of the doctor's face and bearing in the witness' chair, and had concluded that, if pleasantly handled, he could be made to testify pretty nearly to the truth, whatever it might be. He concluded to spar for an opening, and it came within the first half-a-dozen questions:—

Q. "What medical name, doctor, would you give to the plaintiff's present ailment?"

A. "He has what is known as "traumatic microsis."

Q. "Microsis doctor? That means, does it not, the habit, or disease, as you may call it, of making much of ailments that an ordinary healthy man would pass by as of no account?" A. "That is right, Sir."

Q. (Smiling). "I hope you haven't got this disease, doctor, have you?" A. "Not that I am aware of, Sir."

Q. "Then we ought to be able to get a very fair statement from you of this man's troubles, ought we not?" A. "I hope so, Sir."

The opening had been found, witness was already flattered into agreeing with all suggestions, and warned against exaggerations.

Q. "Let us take up the bladder troubles first. Do not practically all men who have reached the age of sixty-six have troubles of one kind or another that results in more or less irritation of the bladder?" A. "Yes, that is very common with old men."

Q. "You said Mr. Metts was deaf in one ear. I noticed that he seemed to hear the questions asked him in Court particularly well; did you notice it?" A. "I did."

Q. "At the age of sixty-six are not the majority of men gradually failing in their hearing?" A. "Yes Sir, frequently."

Q. "Frankly doctor don't you think this man hears remarkably well for his age, leaving out the deaf ear altogether?" A. "I think he does."

Q. (Keeping the ball rolling). "I don't think you have even first symptoms of this traumatic microsis."

A. (Pleased) "I haven't got it at all."

Q. "You said Mr. Metts had had concussion of the brain. Has not every boy who has fallen over backward, when skating on the ice and struck his head, also had what you physicians call concussion of the brain?" A. "Yes, Sir."

Q. "But I understood you to say that this plaintiff had had, in addition hemorrhages of the brain- Do you mean to tell us that he could have had hemorrhages of the brain and be alive to-day?"

A. "They were microscopic hemorrhages."

Q. "That is to say, one would have to take a microscope to find them?" A. "That is right."

Q. "You do not mean us to understand, Doctor that you have not cured him of these microscopic hemorrhages?"

A. "I have cured him; that is right."

Q. "You certainly were competent to set his broken leg or you wouldn't have attempted it; did you get a good union?"

A. "Yes, he has got a good, strong, healthy leg."

Counsel having elicited by the smiling method all the required admissions, suddenly changed his whole bearing towards the witness, and continued pointedly.

Q. "And you said that 2,500 dollars would be a fair and reasonable charge for your services. It is three years since Mr. Metts was injured. Have you sent him no bill?" A. "Yes, Sir, I have."

Q. "Let me see it. (Turning to plaintiff's counsel.) Will either of you let me have the bill?" A. "I haven't it, Sir."

Q. (Astonished). "What was the amount of it?" A. "1,000 dollars."

Q. (Savagely). "Why do you charge the railroad company two and-a-half times as much as you charge the patient himself?"

A. (Embarrassed at this sudden change on the part of counsel). "You asked me what my services were worth."

Q. "Didn't you charge your patient the full worth of your services?"

A. No answer.

Q. (Quickly). "How much have you been paid on your bill—on your oath?"

A. "He paid me, 100 dollars at one time, that is, two years ago: and at two different times since he has paid me 30 dollars."

Q. "And he is a rich commission merchant down town!" (And with something between a sneer and a laugh, counsel sat down)

(xvi) An example of a skilful cross-examination is 'found in the report of the trial of William Palmer at the Old Bailey for poisoning of one Cock by strychnine. The defence sought to show that the cause of death was tetanus, and called a celebrated medical man of Leeds, who said the symptoms were testanic; that Cock was a man of delicate constitution, had a sore resulting from disease, was excitable, and that on a man of such a constitution and temperament having the sore, a slight cold would have the effect of causing idiopathic tetanus. On cross-examination by Mr. Cockburn, the doctor was forced to admit that he did not really know that the deceased was delicate and had not learned the organs were found in a healthy condition after death. He was made to confess that he did not know the deceased had ever had any such disease or sore as referred to in his direct testimony, he also admitted there was no ground for supposing that Cock had a cold. Cockburn then inquired:—"Now, Sir, with the delicate constitution gone, the disease gone, the sore gone, the cold gone, what ground have you for saying that there was idiopathic tetanus?" The unhappy physician squirmed, hedged and took refuge in several general assertions, which were, however, completely demolished by his relentless inquisitor, while the effect of the testimony was entirely overthrown by the superior knowledge of poisons displayed by the lawyer who conducted the cross-examination. 14 Cr. L. J. 20-21 (Jour).

(xvii) "This lawyer is a wizard," said a Philadelphia Judge. "In one of his first cases he had to cross-examine a medical expert as famous a physician as the country boasted. Of course, Beck wanted to be little the big man as much as possible. He began his cross-examination thus:—

Q. Doctor, you attended Russell Sage, I believe?

A. Yes, I was called in consultation during Mr. Sage's last illness.

Q. Where is Russell Sage now? A. He is dead.

Q. Did you attend Grover Cleveland, doctor? A. Yes.

Q. Where is Cleveland now? A. Dead.

The doctor had spoken sharply, and the court-room tittered, but Mr. Beck calmly and quietly went on:

Q. "And old Commodore Vanderbilt—I believe you were summoned in his case? A. Yes.

Q. "Where is the poor old Commodore to-day?" A. Dead

Q. Did you, doctor, also attend George M. Pullman, Marshall Field, the elder Sothern Philip, D Armour, Richard Mansfield and Mark Twain?  
A. I did

Q. 'And they are all—' A. Dead.

The lawyer nodded to the jury, shrugged his shoulders, smiled and sat down. The medical experts' testimony somehow did not seem so wonderful after that. See Washington Star quoted in 23 M. L. T. 12.

(xviii) The accused prosecuted on charges of sexual degeneracy in the person. A doctor was called in for the prosecution whose evidence turned out to be irrefutable and very damaging to the accused. The defence Counsel thought it useless to attack the substance of the story but he applied the method of offsetting it by discrediting the witness personally. The Counsel set clever plans some weeks before the trial. An investigator purchased 12 ultra violet rays machine of a new type which had been recently patented, and which had appeared on the market only six months previously. The Investigator posed as a salesman of the machine and offered one in return for a testimonial signed by the physician to the effect that he had made everyday use of a lamp of that specific type for several years and that it had always operated satisfactorily. The doctor did not realise that the machine was of a new type and with the handsome inducement of one as a gift, he signed the testimonial, which ultimately found its way to the files of the lawyer.

Q. Is this testimonial signed by you? A. Yes.

Q. Is your Certificate absolutely genuine. A. Yes.

The defence Counsel abruptly terminated his cross examination and offered the testimonial in evidence with the help of an Expert to prove that the machine which the doctor claimed to have used for a number of previous years had been on the market only for a few months. Thus with the manufactured set off prepared by fore-sight and industry, the testimony which could not have been otherwise attacked was completely ruled out.

(xi) William Hinshaw was charged for the murder of his wife. He put up the defence that burglars had entered the house and had shot his wife when she had desisted. He also stated that she had struggled with the burglars for sometime and had ran over to him and had said "Will, is this you," and then she died. He produced an expert to corroborate his version. On the other hand Coroner's Autopsy had shown that the bullet had penetrated and shattered the speech centre of her brain. The cross examiner suspected that the conclusions drawn by the Expert were plainly erroneous and that the Expert was either giving false evidence or was honestly mistaken. The cross examination proceeded thus:

Q. Doctor, in the forty years of your practice, did you ever treat or see treated a human being wounded as Mrs. Hinshaw was? A. I have seen treated and I have treated quite a number of, brain injuries.

Q. My question is doctor, wounded as Mrs. Hinshaw was? A. No, I never did.

Q. Do you believe that a woman with her speech center shattered by a .38 calibre bullet could have arisen out of bed, engaged in a desperate fight with the burglars and during the fight, could have gone to her husband, who was fighting with another burglar, put her arms about her husband's neck and say "Is this you, Will?" A. I don't know. It might be possible.

Q. It would have been a miracle, would it not? A. Yes, it looks like that.

Q. But the days of miracles have passed, even in Indiana, have they not? A. I guess they have.

## CHAPTER 82

### Of Draftsman Regarding Plan.

The evidence of draftsman who prepared the map or plan in a criminal case and more especially in a murder case is very important. Sometimes some indices are given on the map which though un-noticed by the defence counsel sometimes go to prejudice the case of the accused. As regards the question of admissibility in evidence of such maps, the following points may be noted :—

The person who prepares a map for use in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses should not be noted on the body of the map but on a separate sheet of paper, annexed to the map as an index thereto, the spots being marked A, B, C, etc. 1924 C. 1029 : 84 I. C. 654 : 52 C. 172, 1925 C. 909 : 89 I. C. 242, 1926 C. 550, 1936 P. 11. Where the trial was characterized by grave irregularities in procedure and a map prepared by the investigating officer had been rejected as not drawn to scale, a retrial was ordered. 64 I. C. 665 : 25 C. W. N. 609 : 23 Cr. L. J. 41. There are certain kind of indices which are regarded as inadmissible but legitimate index should be exhibited on the map. 1936 P. 11, 52 C. 172. A map prepared by Police on information is inadmissible in evidence. 1925 C. 959.

Generally the draftsman would depose that he prepared the plan at the pointing out by the witnesses, but it can be easily shown by the cross-examination of those witnesses that they did not go to the place of occurrence on the day the draftsman made the measurements. Sometimes the points which help the accused are intentionally omitted from the plan, *e. g.*, the height of the wall to prove accessibility of the place, mention of adjoining houses owners of which are favourably inclined towards the accused, etc., etc.

#### Illustration.

In the famous Towers of Silence Case, Bombay, the cross-examination of Mr. Willcox, draftsman, by Anstey, defence counsel, shows how a formal witness who is called merely to prove a plan can be cross-examined with effect. This will also show as to the particular points to which attention should usually be drawn by the cross-examiner. The reader is referred to Ch 7 of authors' Law and Methods of Police Investigation 1947 where this subject is exhaustively dealt with.

## CHAPTER 83

### Of Exaggerating and Enthusiastic Witnesses

Some witnesses have got a tendency to exaggerate a thing without actually realising the result to such exaggeration. Ignorant villagers are generally given to such habit. If you just ask them as to the number of persons present at the scene of the occurrence, they will invariably say that the number of persons was several thousands whereas they were actually 20 to 25 persons. In such cases lead the witness to an absurd position.

One method of exposing falsehood is to encourage him to continue his tale of falsehood until it lands him in an apparent absurdity.

On this point, Harris says :—"Give the lying witness plenty of line and you will find that his tale of lies will be proportionately great. A mile with him will become 'three' if you let him think your object is to make it less.

Darkness will become 'light as day,' and the moon will shine with the utmost splendour when, according to the almanac, she is nowhere. A witness once told me he did not know if it was moonlight in the middle of a fine July day. It is impossible to tell how far the downright liar will go if you only give him a little encouragement. You may not be able to contradict him upon all points, but this advantage always accompanies his evidence, that *exaggeration, as a rule, requires no contradiction*. Let him exaggerate and colour to the full extent of his inclination or imagination, and when he has completed the picture everyone will see that it is a monstrosity." See Harris, p. 71.

Falsehood *in toto* is far less common than misrepresentation. Under this head comes exaggeration, the dangers of which have been pointed out in the introduction. There are, however, other forms, e. g., Question—"About what thickness was the stick with which you saw Reus strike his wife Defuncta?" Answer—"About a thickness of a man's little finger." In truth it was about the thickness of a man's wrist. Falsehood in this shape may be termed falsehood in quantity. Question—"With what food did the jailor Reus feed the prisoner Defunctus?" Answer.—"With sea biscuit in ordinary eatable state." In truth the biscuit was rotten in great part. Falsehood in this shape may be termed falsehood in quality. (See Bentham's Judicial Evidence, p. 141).

"Some persons are exaggerators by temperament. They do not mean untruth, but their feelings are strong, and their imagination vivid, so that their statements are largely discounted by those of calm judgments and colder temperament. They do not realize that we always weaken what we exaggerate" Tryon Edwards. Exaggeration is a blood relation to falsehood, and nearly as blameable. H. Billou.

There are some persons who would not for their lives tell a direct and wilful lie, but who so exaggerate that it seems as if for the lives they could not tell exact truth. Paget.

Those who exaggerate in their statements belittle themselves. Some men can never state an ordinary fact in ordinary terms. All their geese are swans, till you see the birds. J. B. Owen.

There is absolutely no strength in exaggeration; even the truth is weakened by being expressed too strongly. Exaggeration is neither thoughtful, wise nor safe. It is proof of the weakness of understanding, or the want of discernment of him that utters it, so that even when he speaks the truth, he soon finds it is received with partial or even utter unbelief. The habit of exaggeration becomes a slavish necessity. Therefore, one should never speak by superlatives; for in so doing one will be likely to wound either truth or prudence. Those who practice exaggeration pass their lives in a kind of mental telescope through whose magnifying medium they look upon themselves, and everything around them.

#### Illustrations.

(i) A woman was a witness in a will case and while giving evidence about certain question deposed that at that a particular time chimney of the lamp broke. The cross-examining counsel asked her, "In how many pieces?" She replied that the chimney broke into thousands of pieces.

It was thus clear that the witness was merely exaggerating it.

(ii) On Boswell telling Dr. Johnson of an earthquake which had been felt in Staffordshire, Dr. Johnson said to him:—"Sir, it will be much exaggerated in public talk; for, in the first place, the common

people do not accurately adapt their words to their thoughts ; they do not mean to lie, but taking no pains to be exact, they give you very false accounts. A great part of their language is proverbial. If anything rocks at all they say it rocks like a cradle ; and, in this way, they go on." Cox's Advocate.

(iii) A good method of cross-examining a certain class of exaggerating and enthusiastic witnesses is "to take advantage of their enthusiasm in the cause of the party whose side they wish to maintain, and quietly and gradually lead them to an extreme position which can neither be fortified nor successfully defended. They usually take pleasure in imparting their knowledge to others while upon the stand, for they have a large share of the vanity which Max O'Rell attributes to every American citizen, when he says That in America 'every fellow wishes every other fellow to think he is a devil of a fellow,' and this fondness for display and love of approbation will often cause them to get into very deep waters ; but, in order that the advocate may accomplish his purpose, he must conceal the object he has in view, and remain master of himself, no matter how trying his situation may prove. He must, then, when he has led the witness to make statements which are improbable and unreasonable, ask him to explain his glaring inaccuracies, and if he attempts to equivocate or give evasive answers, sternly hold him to the issues involved." Hardwick's Art of Winning Cases, P. 175.

(iv) In a dacoity case a witness who was a gangman of the railway and was working on the lines, deposed that he was taking rest at noon on a hot summerday when six dacoits on three horses armed with guns, etc., passed by him. In cross-examination he deposed that the accused were going at rapid pace and he just partially rose and had only a glimpse of them. He exaggerated things to such an extent that his testimony was at once thrown out. He said that the accused Nos. 1 and 5 were armed with a particular weapon and were sitting on the first horse ; accused Nos. 2 and 6 were riding a mare and the accused Nos. 3 and 4 were riding a chesnet coloured horse and were armed with a pistol and a gun. It was impossible that an ignorant person like the witness should be able to remember the details when giving evidence three years after he saw the dacoits, and be able to see if the animal was a horse or mare, on which a particular dacoit was riding. See this case quoted in Chapter XLVI.

(v) See illustration to Ch. 24 *supra*.

**Enthusiasm of a Witness.** If a witness is enthusiastic for a side, he would depose to certain things in favour of the party for whom he is a witness, although he did not observe those things. In his enthusiasm for the party, he tries to help him as much as he can. Sometimes such witnesses are blinded by their enthusiasm in a particular cause. Such witnesses are common in cases involving political, communal and religious strifes. Many fanatics out of their enthusiasm, generally comes forward to bear testimony to certain incidents, which they have not seen or heard. If a witness has some pecuniary or personal interest in a cause, his evidence should be received with caution and great scrutiny. One who is enthusiastic, imagines that he can do things which by their nature it would be almost impossible for him to do.

A witness, who, either from self-importance, a desire to benefit the cause of the opposite party, or any other reason, displays a loquacious propen-

sity, should be encouraged to talk in order that he may either fall into some contradiction,<sup>8</sup> or let drop something that may be serviceable to the party interrogating. "Of this damning kind," observes the author of a judicial pamphlet, "are witnesses who prove too much; for instance that a horse is the better for what the content of mankind calls a blemish or a vice. The advocate on the other side never desires stronger evidence than that of a witness of this sort; he leads the witness on from one extravagant assertion on his friend's behalf to another; and, instead of desiring him to mitigate, presses him to aggravate his partiality; till at last he leaves him in the mire of some monstrous contradiction to the common-sense and experience of the Court and Jury; and this the advocate knows will deprive his whole testimony of credit in their minds." See *Best on Evidence*.

When corporal punishment in the army excited so much interest some time since, one party denouncing it as useless cruelty, and the other insisting on it as indispensable to the government of an army,—the author met an officer who warmly defended the practice, and having first taken care to ascertain that none of his hearers had witnessed a military flogging, assured them with great earnestness that there was nothing in it; he had seen a soldier receive nine hundred and fifty lashes, and not mind it in the least. It never occurred to this zealous person that were this true, the usual punishments of 50, 100 or 350 lashes could not be very effective means of enforcing military discipline." *Best on Evidence*, p. 612.

## CHAPTER 84

### Of Eye-witness

Purjury is so common that a litigant can always procure a number of eye-witnesses who will readily come and swear before the Court. Such witnesses can be thoroughly cross-examined and the real truth can be elicited from them. An eye-witness is always to be preferred to a witness who "thinks," "guesses," and "supposes" all through his testimony. Lord Coke says "one eye-witness is worth more than ten ear witnesses." Visual sensitiveness varies not only between persons of different races, but between those of the same race. The Bushman is impressible by changes in the field of view which do not impress the European, and such tests as occur in the telescopic search for minute stars show that, in the same race, the amount of light which excites a distinct feeling in one person excites no feeling in another. Spenser, *Principles of Psychology*, p. 80. Dr. Hans Gross says that gypsies have the sight of the owl and the eye of the fox, enabling them to recognize, even in the night time, each passer-by long before the latter has perceived them. Dr. Hans Gross, *Criminal Investigation*, p. 362.

**Defective Observation:**—The declarations of witnesses are the recollections of their perceptions. First there is a sensory impression; then a perception after that reception; then a memory record. Perception is the apprehension of something seen, heard, felt, tasted, or smelt. With our sensory organs we see, hear, smell, and so forth, again and again without any awareness that we are so doing, but there is a mental registration of all this. This memory may or not be made conscious later on, when accidentally or intentionally stimulated.

The following quotation from Hans Gross is helpful: "My favourite demonstration of how surprisingly little people perceive is quite simple I set a tray with a bottle of water and several glasses



on the table, call express attention to what is about to occur and pour a little water from the bottle into a glass. Then the things are taken away and I ask what has been done. All the spectators immediately reply: 'You have poured water into a glass.' Then I ask further: 'With what hand did do it? How many glasses were there? Where was the glass into which I poured the water? How much did I pour? How full was the glass? Did I readily pour out or did I only make a pretence of doing so? How full was the bottle? Was it really water and not wine? Was it not red wine? What did I do with my hand after pouring out the water? How did I look when I did it? Did I shut my eyes? Did I stick my tongue out? Did I do so while I was pouring out the water, or before or after I did so? Did I wear a ring on my hand? Was my shirt cuff visible? What was the exact position of my fingers when I held the glass?'.....These questions might be multiplied. It is as astonishing as it is amusing to note how little correctness there is in the answers, how people will quarrel about their replies, and how extraordinary are those replies. Yet, what do we ask of witnesses who have to describe much more complicated matters to which their attention had not been called before-hand and who were not questioned immediately after the event but much later; who moreover, may at the time have been overcome by fear, surprise, and so forth. I find that probing the testimony of even comparatively trained witnesses sometimes produces too funny results, and the conclusion that can be drawn from such evidence is scarcely valuable. Such suggestive remarks as: 'But you will know,' 'Just recall this,' 'You would not have been so stupid as not to have eyes—', and so on, in kindly whether—, 'But my dear woman, you have eyes—', and so on, in kindly fashion—, may bring out an answer, but what real worth can such a reply have?" See *Crime and Its Detection* by T. W. Shore, at p. 138.

When a witness states that he has seen a thing, his evidence should bear more weight than if he said he had heard a particular sound. Sight is more dependable than hearing or any other sense, unless the latter has been trained. A man will rarely be mistaken when he declares that he has seen a shot fired; he may often be so when he says only that he has heard it, for many sounds arising from different causes are so similar if not exactly the same. The bursting of a tyre may easily be taken for the explosion of a charge in a gun or pistol, especially by those not familiar with fire-arms. The mistakes of perception, such as swearing that I have seen my friend at such a place at such a time when he can prove that he was not there and it turns out that I have seen someone like him must be added the errors that arise in and the confusion that exists between, what is seen by this witness and that on the same occasion, arising out of differences in the visual organs of the persons. The short-sighted witness has perceived him distinctly. On the other hand the short-sighted often possess keener vision for matters of minute detail and for things near them than do the long-sighted. Contradictory evidence is not necessarily on either hand a deliberate mis-statement. It is for the examiner to find out which statement, if either, is accurate. See *Crime and Its Detection* T. W. Shore at p. 139.

In addition to the physical causes of error in seeing there are those which may be called mental. "It is notorious that we often see what we believe we shall see, what we expect to see, and so are frequently badly mistaken. We see a man making a drive with his fist at the face of

another, who reels back. He may go so close that we will swear that a blow had been received, yet in truth there may have not been any contact. When reading a book or a newspaper it is easy to pass over misprints, believing that the letters we expect to see are actually there. Or we see the letters "S. C. O." painted over a shop or printed on a bill, and we think we also see the letter "T" because we expect to see it: but the fourth letter turns out to be "W." Such errors in visions are not uncommon and on the part of a witness may prove disastrous. There are many quite common optical illusions, for which allowance should be made when examining a witness. An empty room appears to be larger than one of the same size which is filled with furniture; a man of average height looks tall when with several undersized men and *vice versa*, a fact of which Charlie Chaplin has availed himself to laughable purpose; a lonely tree in a wide field appears shorter than it really is. Trinity Church, New York City, appears like a toy alongside the high buildings that surround it. Long distances are often underestimated by the vision and short once overestimated. When walking, if tired, a long stretch of road ahead will appear longer than it will do when we are fresh. As the train rushes along, it is the telegraph poles that fly past. See *Crime and Its Detection* by W. T. Shore at p. 140.

**Defective Memory.** Most people are indignant when they are accused of having an untrustworthy memory. In most of us memory is far from reliable. The causes of error are many. Memory plays strange tricks, as we see in the events of every day life. We have carefully put something in a place which we feel sure that we shall remember, often with irritating results. We decide that there is no need to make more than a mental note of a name or address, or of a telephone number, yet when we desire to recall it, perhaps urgently, it will not come to mind. Yet in Court, or to a police constable or official, witnesses will glibly testify to what they said, saw or heard may be many days or weeks ago. See *Crime and Its Detection* by W. T. Shore at p. 143.

"Some memories are rapid, some slow; some retentive of names, some of faces, some of places. It has been well said: "Just as no two persons have exactly the same face, certainly no two have the same kind of memory." There is a too great readiness to take for granted that a witness has a good memory; except when he or she says exactly what we do not wish to hear. "As a rule the memory of a child is clear and distinct only in regard to quite recent events, but it is an over-statement to say that a child remembers the latest event alone. Again as a rule, girls have some accurate memories than boys, but upon this as upon all generalizations it is not safe to rely, which is the reason for its being mentioned. Here again it must be impressed upon the criminal investigator that each witness has idiosyncrasies and must be treated as identity." When examining a witness, the investigator in search of a detailed account of an event or a description of a person seen must go warily. When several witnesses are testifying to the same facts, their recollections, though in the main in accord, may differ widely about minor matters. What can be done? Of course, whenever these statements can be checked by other evidence, this will be done, but such is not always possible. Inquiry may be made into the witness's reputation for accuracy. But all this takes time, of which there is often little, if any, to spare. Native wit and experience of human nature must be relied on to distinguish fact from fiction. The first time that he tells

his story is the most likely time for the witness to avoid what may be called "embroidery." The effect of repetition is the filling in of memory-gaps, often unconsciously ; perhaps with details that he has heard from others or has read in the newspaper which he comes to believe have actually been observed by himself. Each time a recollection is called up it may arouse other memories. See *Crime and Its Detection* by W. T. Shore at p. 143-144.

The following cases relating to the evidence of eye-witnesses will be found useful :—

When an alleged eye witness did not rescue the injured party, the presumption is that he did not see the fight 1932 P. L. R. 1915. If alleged eye witnesses are inimical to the accused or belong to opposite fraction, it is not safe to rely on their uncorroborated testimony. 1930 L. 311. The mere fact that an eye witness does not come forward immediately an investigation begins is not in itself sufficient ground for rejecting his testimony 1931 L. 529. Eye-witnesses who had witnessed the crime and assisted in concealing evidence or connived at and gave no information to Police or any other person are no better than accomplices. 1929 L. 540 : 120 I. C. 190 : 31 Cr. L. J. 50. In case of mutual infliction of injuries on each other, conviction should be under S. 326 and not under S. 307 when there are no eye-witnesses. 2 R. 558 : 1925 R. 133. If some eye-witnesses were not called by the prosecution no inference favourable to accused can be drawn. 1923 O. 217 : 74 I. C. 434. Hypothetical opinion of a medical man should not outweigh the testimony of respectable and disinterested eye-witnesses. 50 C. 100 : 1923 C. 116 : 1924 B. 457. The mere fact that eye-witnesses did not come forward immediately the investigation began, is no reason to reject their evidence 1931 L. 529. When a prosecution witness who was not interested in accused Nos. 1 and 2 came up after the occurrence and was told by eye-witnesses that accused No. 3 killed the deceased and they did not name Nos. 1 and 2. Held, that the accused Nos. 1 and 2 cannot be convicted. 1923 L. 236 (2). The evidence of a witness who says that he has seen murder being committed but not giving information, is not free from suspicion. 1935 O. 1 : 1934 O. 315. The fact that the alleged eye-witnesses were disposed at the outset not to disclose what they knew is no ground to discredit their evidence. 1935 C. 591 : 36 Cr. L. J. 1254. Evidence of eye-witness should not be rejected simply because she is wife of the complainant. 1933 O. 340 : 34 Cr. L. J. 538.

### Illustrations

(i) It is said that A had a beautiful daughter who at the picturesque age of 15 began to love one B. In spite of remonstrances by her father she would not give up the amorous pursuit. A was very influential and therefore, he contrived to implicate B in some serious offence. He sent his daughter away to a far off place and gave it out that she had been murdered by B. He fabricated the false evidence in the following manner :—He got some of her clothes besmeared with blood and had thrown them near the canal bank and after killing a goat got its blood sprinkled near about the clothes. Three witnesses swore that they saw B giving fatal blows with a sword on the neck of the girl and that he threw her body in the canal.

The alleged eye-witness said that they did not draw near as they were threatened with a pistol which the accused was holding at that time in the other hand. After police investigation the accused was sent up for trial and committed to Court of Sessions. During the trial all alleged witnesses

deposed against the accused and their evidence could not be shattered as they were quite disinterested and had agreed in their version to the minutest details. The accused had made a confession before the Magistrate due to the threats held out by the police. He was found guilty and sentenced to death. The case went up to the A. P. Pillate Court for confirmation of the sentence and the accused also filed an appeal against his conviction. When the case was being argued before their Lordships, a girl appeared in Court and stated that she was the daughter of A, and for whose murder the accused has been sentenced to death. The Judges recorded her statement. Her parents and the eye-witnesses were sent for and they identified her to be the same girl. The accused was acquitted and prosecution for giving false evidence was lodged against prosecution witnesses.

A very common form of *conspiracy* is to cause a person to disappear and then to charge with murder some person against whom a spite is cherished. A plausible explanation is given of the disappearance of the body of the alleged murdered person, or a putrid corpse is obtained from the adjoining river and gashing it in several places, it is brought forward as the remains of the missing individual. In such conspiracies circumstantial details are not infrequently sworn to by several persons, testifying as eye-witnesses to alleged facts of the murder, to the burial of the corpse, etc., so that conviction for the murder may be duly passed, and the falsity of the whole proceedings not be discovered until the *reappearance alive of the alleged murdered person*. Lyon's Med. Jur. 1904, p. 17.

## CHAPTER 85

### Of False Witness

#### *In Case of False Evidence or Perjury*

Sometimes you will find a witness committing straight out, wilful perjury—sometimes, not often. "When you find that, unsheath your sword and have a straight fight. You will have the sympathy of the Court, and you will soon catch the sympathy of the jury. That man must be slaughtered. That does not happen so often as people outside of the Court-house imagine: yet it does happen." 14 Cr. L. J., p. 27.

"He who appears as if were uneasy by reason of the wickedness of his own crimes, shifts from place to place, who suddenly coughs much and likewise draws his breath now or again, who scratches the ground with his feet, who shakes his hands and clothes, the colour of whose countenance changes, and whose forehead sweats, whose lip becomes dry, who looks above and about him, and who talks much irrelevantly, in a hurried manner, and without being questioned, should be known as a false witness. Such a wretch should be punished severely." See *Narada Smriti*.

#### Of Partly False Witness (*Falsus in uno, falsus in omnibus*).

Sometimes we find that the testimony of a witness is partly false. In such a case, care should be taken to find out whether it is false as to material points. There is always embroidery to a story, however, true in the main.

"A liar is not to be believed even he speaks the truth" is an old saying.

The maxim "*Falsus in uno, falsus in omnibus*" is a sound one; but it may be possibly pushed too far. As has already been stated, it must not

be supposed that all the untrue testimony given in Courts of Justice proceeds from an intention to mis-state or deceive. On the contrary, it most usually arises from interest or bias in favour of one party, which exercises on the minds of the witnesses an influence of which they are unconscious, and leads them to give distorted accounts of the matters to which they depose. Again, some witnesses have a way of compounding with their conscience; they will not state a positive falsehood, but will conceal the truth or keep back a portion of it: while others, whose principles are sound, and whose testimony is true in the main, will lie deliberately when questioned on particular subjects, especially on some of a peculiar and delicate nature. The mode of extracting truth by the cross-examination is, however, pretty much the same in all cases, namely, by questioning about matters which lie at a distance, and then showing the falsehood of the direct testimony by comparing it with the facts elicited. *Broom's Max.* XXVIII, 4th Ed.; *Best on Evidence*, p. 610.

When the prosecution cannot be believed in its essential details, conviction cannot be based on part of the story. 1924 P. 813: 25 Cr. L. J. 724, 47 I. C. 73. *Cont.* 10 P. 590: 1931 P. 384: 135 I. C. 81: 33 Cr. L. J. 111. Evidence should not be rejected wholesale simply because some of it is unreliable, if the story told by witnesses is in the main true. 1926 N. 129: 89 I. C. 663. The fact that a witness makes mistakes in identification, is no reason for discrediting his evidence in other matters. 45 A. 309: 1923 A. 352: 24 Cr. L. J. 526. Where prosecution witnesses are untruthful as to the greater part of their evidence it would be dangerous to convict them on the residue without corroboration. 42 C. 784, 1930 O. 460: 32 Cr. L. J. 94, 1933 O. 457, 1936 A. 747, 55 A. 379, 1931 L. 38: 32 Cr. L. J. 522, 28 Cr. L. J. 185, 45 A. 300, 1927 L. 797, 1921 P. 406, 1924 N. 33, 1929 O. 248, 1933 A. 401, 1932 B. 424, 1930 M. W. N. 723. *See* 1931 P. 384: 10 P. 59. When the greater part of the story is disbelieved, a Court cannot reconstruct a story wholly inconsistent with that told by witnesses. 1924 P. 813: 25 Cr. L. J. 724. When the evidence of a witness stands discredited on the crucial point it cannot be relied on a less important point without strong corroboration. 1930 M. W. N. 723, 42 C. 313, 42 C. 784. If the Judge has discredited the accounts of the occurrence as given by the prosecution and based the conviction on a narrative of his own, framed on surmise and conjecture, the conviction will be set aside. 17 C. W. N. 538, 81 I. C. 212: 1924 P. 813: 25 Cr. L. J. 724. It is permissible for a Court to accept part and reject the rest of any witness's testimony. 78 I. C. 542: 1924 N. 129: 20 N. L. R. 63. Where the major portion of the evidence is false, no case can be built on it. 1934 O. 124: 35 Cr. L. J. 804. Evidence of perjured witness should not be discarded altogether. Court must sift truth from falsehood 1934 O. 507, 1933 A. 896 Diss from. Simply because of existence of some deliberate falsehood evidence cannot be totally rejected. 1933 O. 269. Evidence of perjured witness is of no value by itself or by way of corroboration. 1933 A. 834: 55 A. 639, 1933 A. 401, *Rel. on.* If the prosecution case is false and perjured in material particulars and is supported by perjured evidence, the whole case must be thrown out. 1933 A. 896: 146 I. C. 914, 1933 A. 31, 1933 A. 401, 14 C. 164 and 1933 C. 463 *Ref.*

If an individual were to invent a story entirely, the result would be his inevitable detection; but if he build a structure of falsehood on the foundation of a little truth, it may put honest man's life in jeopardy. The most effectual way of laying a plot, is not swear too hard or too much or to come too directly to the point but to knit the false with the true, to

interlace reality with fiction and to escape detection by taking most especial care never to have two witnesses to the same effect and also to make the facts as moderate and as little offensive as possible. Rhetoric, Part I, Chap. III, S. 1; Field's Law of Evidence in Br. India, 8th Ed., p. XXXVIII.

The maxim *Falsus in uno falsus in omnibus* (false in one particular; false in all) is a dangerous one, especially in India, for if a whole body of testimony were to be rejected because the witness was evidently speaking untruth in one or more particulars, it is to be feared that witnesses might be dispensed with. There is always embroidery to a story, however true in the main. When main part of the deposition is true, it not arbitrarily be rejected because of a want of veracity on perhaps some very minor point. Field's Law of Evidence in Br. India, 8th Ed., pp. XL and XLI. But the case will be different if one of the *essential* circumstances in the story be clearly unfounded. This, to use a felicitous expression of Mr. Hallam's, "is to pull a stone out of an arch, the whole fabric must fall to the ground." *Ibid.* See also Constitutional History of England, Vol. II, p. 687, 4 Moo. I. A. 441. Ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to the Courts may commonly be; that is, *due weight* must be given to evidence and it should not be rejected due to general distrust nor to perjury widely imputed, without some grave grounds to support the imputation. 14 Moo. I. A. 354. "There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on one side or the other, than to consider *what facts are beyond dispute*, and to examine *which of the two cases best accords with those facts* according to the ordinary course of human affairs and the usual habits of life." 1 Moo. I. A. 19; 5 W. R. P. C. 26-29.

*Probabilities* are an important element of consideration where the evidence appears unreliable or is directly conflicting; but a case should not be decided upon probabilities alone, apart from the evidence which the parties have submitted to the Court. 21 W. R. 436.

**Disbelieved Regarding one Accused.** Evidence disbelieved as to one accused need not necessarily be rejected altogether. 30 P. W. R. 1914 Cr. Evidence disbelieved against five accused must be convincing before the 6th person could be convicted. 1931 L. 38; 1934 O. 13; 35 Cr. L. J. 681. An accused should not be convicted on the strength of evidence which is disbelieved so far as other accused are concerned, if the ground for disbelieving it is common to all of them. 20 P. W. R. 1909 Cr., 30 P. W. R. 1914 Cr., 1921 P. 406. If evidence of eye-witnesses is accepted against some accused but not against others, it does not necessarily vitiate the judgment. 1932 L. 424. Where there is conclusive proof of perjury on the part of alleged eye-witnesses with regard to one accused, Court would refuse to convict others on their evidence. 1934 A. 908. If a witness has deliberately committed perjury in falsely implicating one accused, it is impossible to accept his evidence against another accused. 1935 L. 922. Appeal No. 320 of 1934 approved 1933 A. 314; 55 A. 379; 1933 A. 401; 34 Cr. L. J. 765.

If prosecution witnesses are considered unreliable in case of some accused, their evidence must be closely sifted as regards others. 1933 O. 59; 34 Cr. L. J. 243. If the approver substituted an innocent person and his evidence has been rejected against him, the entire evidence

against other accused should also be rejected. 1933 L. 871 : 35 Cr. L. J. 137. Evidence discarded against some accused should not be relied on against others. 1933 O. 404 : 35 Cr. L. J. 192.

**Of Totally False Witness.** Perjury is, as we have said, a much more uncommon crime than it is usually thought to be. Not that witnesses do not sometimes swear that which is not true, but they are often simply mistaken, and when a witness, instead of wilfully lying, is mistaken, the advocate should by a careful and patient examination prove this to the satisfaction of the jury. It is cruel, brutal, and impolitic for a lawyer to examine a witness upon the theory that he is swearing falsely when he believes that he is only mistaken as to certain immaterial matters in his testimony. Juries love fair play, and they are usually sagacious enough to discover from the demeanour of a witness whether he is swearing falsely or truly, and will govern themselves accordingly. If a witness is dishonest and not desirous of telling the truth, it is very important that he should be examined rapidly, so that he can have no time to concoct plausible answers between questions. If a witness is honest he will answer the questions unhesitatingly. But if he is swearing falsely, by this method his detection will nearly always follow. In conducting the examination of a witness who, he believes, has sworn falsely the advocate has two courses open to him. He may show distrust of the witness by his manner, look, and tone of voice or he may examine him as if he thought him an honest witness. We shall give, further on, particular directions for the guidance of the advocate in following either plan. Both courses have their advantages. The advocate, by letting the witness see that he believes he is not telling the truth, and treating him with great severity, will usually cause the witness to show his guilt by his looks, for as a general rule a liar is a moral coward. But if the witness thinks that what he has already said has been believed, he becomes careless, and if given plenty of rope he will hang himself, and the advocate can easily point out the inconsistencies in, and unreasonableness of, his testimony, to the jury in his address. When the witness has contradicted himself, the advocate should not ask him to explain, but should take advantages of the contradiction in his argument to the jury. If asked to explain, the witness will usually find some satisfactory explanation even if he is obliged to invent it, take back what he has said, or modify or change it. See Wrottesley on the Examination of Witnesses, 11 Ed., pp. 81—83. "There should always be some foundation of fact for the most airy fabric ; pure invention is but the talent of a deceiver." Byron.

The following decisions on concocted evidence will be found useful:—

Where the manipulation in the personnel of the actors in a crime is extremely easy and extremely difficult to refute, the question of motive is extreme importance. 1926 O. 120 : 27 Cr. L. J. 529 : 93 I. C. 1025.

Prosecution witnesses deliberately set about implicating innocent persons run a grave risk of their evidence being rejected *in toto*, even against persons whom the Court suspects as offenders. 1931 L. 38 : 130 I. C. 110 : 32 Cr. L. J. 522. An approver can easily substitute an innocent person for a real offender. 1931 L. 408 : 32 Cr. L. J. 818 : 132 I. C. 185 : 1931 Cr. C. 648. In a murder case when witnesses implicate the accused when they are faced with the necessity of exculpating themselves, their evidence is open to grave suspicion. 1930 P. 338 : 129 I. C. 666. There is tendency in N. W. F. Province to include innocent with the guilty and to ascribe principal part to



guilty persons and minor part to innocent relatives. 1935 Pesh. 75, 1935 Pesh. 50 : 1935 Cr. C. 351. In weighing evidence regard should be paid to (1) what is stated against the accused in first information report, (2) feeling of enmity between the parties, (3) the facility with which he could be implicated and (4) the motive for implicating him. 90 P. L. R. 1909 : 19 P. W. R. 1909 Cr. : 11 Cr. L. J. 130. Where the defence does not cross-examine prosecution witnesses concerning defence version, it is usually safe to conclude that it is an after-thought and the defence evidence is concocted one. 1935 R. 393.

False charges are usually supported by carefully concocted details, sometimes of such a incredibly minute character as to be obviously of a "too perfect kind." Though as a rule much less ingenuity is displayed in perpetrating and concealing the crimes than would be expected from the subtle cunning and deceit practised in the smaller affairs of every day life. Lyon's Med. Jur. 1904, p. 17.

In India severe, even mortal, injuries are sometimes inflicted on an individual with his consent by another or others, for the purpose of supporting a false charge. Lyon's Med. Jur. 1904, p. 153, Lyon's Med. Jur. 1935, pp. 220 238.

One mark of a false case is not uncommonly the extraordinary number of persons who are said to have seen the occurrence, which in the natural course of things would have been witnessed by a limited number of persons only. But sometimes two or three persons are easily found, then a larger number, who, from motives of interest or malignity, will combine to aggrandize themselves or to ruin an opponent. Field's Law of Evidence in Br. India, 8th Ed., p. XXX.

In a case of assault five witnesses described the incident and all detailed the names of the eleven accused *in the same order*. It may safely be said that without concert this could not possibly happen. It happened that the Mukhtar obtained a copy of the complaint made some days previously and, in order to guard effectually against discrepancy, he had made each of the five witnesses *commit it to memory*. Field's Law of Evidence in Br. India, 8th Ed., p. XXIII.

Where several witnesses bear testimony to the same transaction and concur in their statement of series or particular circumstances, there can be only two conclusions—either the testimony is true or the coincidences are the result of concert and conspiracy. To determine which is the case, there are two valuable tests. *First*, are the witnesses independent and acting without concert? *Second*, are the coincidences natural and undesigned. *Ibid* at p. XXII. If a witness has been demonstrably shown to be liar, his evidence should not be acted upon unless it is confirmed by witnesses or circumstances. 1934 L. 743=15 L. 765. Evidence of perjured witness even if corroborated is of no value. 1933 A. 834=35 Cr. L. J. 353, 1933 A. 401, 1933 A. 314, 1936 L. 278=17 L. 460. If a witness is disbelieved his statement cannot be used to corroborate some other witness. 43 Cr. L. J. 549.

Falsehoods not only disagree with truths, but usually quarrel among themselves. A liar begins with making falsehood appear like truth, and ends with making truth itself appear like falsehood. "Some men relate what they think as what they know; some men of confused memories, and habitual inaccuracy, ascribe to one man what belongs to another; and some talk on without thought or care. A few men are sufficient to broach falsehoods, which are afterwards innocently diffused by successive relater." *Johnson*.



It is more from carelessness about the truth, than from the intention of lying, that there is so much falsehood in the world. *Ibid.*

When Aristotle was asked what a man could gain by telling a falsehood, he replied "Never to be credited when he speaks the truth."

"It is no doubt difficult to lay down any hard and fast rule upon which cross-examination may proceed when dealing with a false witness. The cross-examiner ought to probe the witness thoroughly by a minute interrogation. By repeated and exhaustive questioning the cross-examiner always arrives at a point of which the witness has not dreamed and on which he has not consulted his accomplices. The slightest indication of contradiction betrays to the investigator the weak point, and he has only to follow up on the same lines in order to pierce the whole tissue of lies. You must discriminate as clearly as possible the various portions of the witness's deposition. It is not sufficient to wait until the deposition becomes for some reason or other suspicious, for as soon as such reason arises, we have the end of the thread in our hands, and can ordinarily unravel it with ease. But it is necessary to face in advance the possible falsehood of every statement of witnesses. To do so is not to display exaggerated mistrust, but is only a proof of prudence and experience. It must be remembered that the witness whose evidence is entirely false is not so difficult to deal with as the one who mixes truth with some falsehood. With a witness who comes forward with a story entirely false, your cross-examination ought to proceed upon the supposition that the facts are not within his direct knowledge. They are the result of his imaginative faculty or put into his mouth by other to be reiterated by him. He has simply to reproduce what he has no foundation in real impression in his mind. If he be led to traverse beyond the line of his preparation, or obliged by a process of judicious cross-examination to recast the same story according to his own frame of mind and in his own words, he will be found unequal to the task." *See Rahmat Ullah, p. 106.*

If the story which the witness tells be altogether false, the matters he speaks of will not fit in with the surrounding circumstances in all their details, however skilful the arrangement may be. "The multitude of surrounding circumstances will all fit in with a true story, because that is part and parcel of those circumstances carved out from them, no matter how extra-ordinary it may be; just as the oddest shaped stone you could cut from the quarry would fit in again to the place whence it was taken. It is therefore to the rock of which it once formed part, that you must go to see if the block presented be genuine or false. You must in other words go to the surrounding circumstances. The witness, however clever he may be, cannot prepare himself for questions which he has no conception will be put to him; and if you test his imaginary events by comparing them with real events, you will find the real and the false could not exist in their entirety, there must be a displacement of facts which have actually occurred, which is otherwise impossible." *See Harris' Hints on Advocacy, p. 63.*

Bentham says:—"When a man delivers false testimony, whatever falsification is in it may be either of his own invention, or of the invention of someone else, either home-made or imported. Made at home or abroad, the inventor of it must have had a stock, a ground, composed of true facts to work upon. To the true man, knowledge of any facts other than what are presented to him by his own memory is of no use. Why? Because all true facts are consistent with each other, his facts being true; they cannot receive contradiction from any other facts that are likewise. To the mendacious deponent on the contrary, knowledge of other connected facts

is indispensable ; his stock of this sort of information cannot be too extensive for his security against detection ; it can never indeed be sufficiently extensive, because every true fact that has any discoverable bearing upon the case, presents a rock upon which, if unseen, his false facts, one or more of them, are liable to split. " You must approach the object under cover, opening with some questions that relate to other matters, and then gradually coming round to the desired point, and even when you have neared the desired point you must endeavour, every device your ingenuity can suggest to avoid the direct question, the answer to which necessarily and obviously involves the contradiction. The safer and surer course is to bring out the discrepancy by inference, that is instead of seeking to make the witness unsay what he has said, it should be your aim to elicit a statement which may be shown by argument to be inconsistent with the former statement.

Cox in his famous book ' Advocate ' says :—" The question has often occurred to us whether it is more prudent to show such a witness that you suspect him, or to conceal your doubts of his honesty. Either course has its advantages. By displaying your doubts you incur the risk of setting him upon his guard, and lending him to be more positive in his assertions and more circumspect in his answers, but, on the other hand, a conscious liar is almost always a moral coward ; when he sees that he is detected, he can rarely muster courage to do more than reiterate his assertion, he has not the presence of mind to carry out the story by ingenious invention of details and a consistent narrative of accidental circumstances connected with it. A cautious concealment of your suspicions possesses the advantage of enabling you to conduct him into a labyrinth before he is aware of your design, and so to expose his falsehood by self-contradiction and absurdities. Perhaps either course might be adopted, according to the character of the witness. If he is a cool, shrewed fellow, it may be more prudent to conceal from him your doubts of his veracity until he has furnished you with the proof. If he is one of that numerous class who have merely got up a story to which they doggedly adhere, it may be wise to awe him at once by notice that you do not believe him and that you do not intend to spare him. We have often seen such a witness surrender at discretion on the first intimation of such an ordeal. This is one of the arts of advocacy which cannot be taught by anything but experience. It is to be learned only by the language of the eye, the countenance, the tones of the voice that betray to the practised observer that is passing in the mind within. But after having a glance at your man, resolve upon your course, pursue it resolutely. But not deterred by finding your attacks parried at first—persevere until you have obtained your object, or are convinced that your impression was wrong, and that the witness is telling the truth. If you determine to adopt the course of hiding from him your doubts, be careful not to betray doubt by your face nor by tone of voice. A good advocate is a good actor, and it is one of the faculties of an actor to command the countenance. Open gently, mildly, do not appear to doubt the witness ; go at once to the marrow of the story he had told, as if you were not afraid of it ; make him repeat it ; then carry him away to some distant and collateral topic, and try his memory upon that, so as to divert his thoughts from the main object of your inquiry, and prevent his seeing the connection between the tale he has told and the question you are about to put to him, than by slow approaches, bring him back to the main circumstances by the investigation of which it is that you purpose to show the falsity of the story. The design of this manoeuvre is, of course, to prevent him from seeing the connection between his own story

and your examination, so that he may not draw upon his imagination for explanations consistent with his original evidence; your design being to elicit inconsistency and contradictions between the story itself and other circumstances, from which it may be concluded that it is a fabrication. If, however, you adopt the other course and, instead of surprising the witness into the betrayal of his falsehood, you resolve to bring it out of him by a bold and open attack—to awe him, as it were, into honesty—aspect and voice must express your consciousness of his perjury, and your resolve to have the truth. A stern, determined fixing of your eye upon his, will often suffice to unnerve him and will certainly help you to assure yourself whether your suspicions are just or unjust. It may be stated as a general rule, that a witness who is lying will not look you fully in the face with a steady gaze, his eye quivers and turns away, is cast down, and wanders restlessly about. On the contrary the witness who is speaking the truth or what he believes to be the truth, will meet your gaze, however timidly, will look at you when he answers your questions, and will let you look into his eyes. There may be exception to this rule, but it rarely fails to inform the advocate whether the person subject to cross-examination is the witness of truth or of falsehood.

Thus assured and pursuing your plan of bold attack, there needs to be no circumlocution, no gradual approaching, as in the other method of surprisal, but go straightway to your object; plunging the witness at once into the story you are questioning. Make him repeat it slowly. It will often be that under the discomposure of your detection of his purpose, he will directly vary from his former statement, and if he does so in material points, which are sufficient to discredit him, it will usually be the more prudent course to leave him there, self-condemned, instead of continuing the examination, lest you should give him time to rally, and perhaps contrive a story that will explain away his contradictions."

A witness whose testimony is partially false is more difficult to deal with than a wholly lying witness. "A half-truth is the blackest of lies" Avoid giving the witness cause for suspicion, as the witness is apt to be put on his guard and to be cautious in his answers, if he suspects that you doubt his veracity.

Wellman says: "I however, the manner of the witness and the wording of his testimony bear all the earmarks of fabrication, it is often useful, as your first question, to ask him to repeat his story. Usually he will repeat it in almost identically the same words as before, showing he has learnt it by heart. Of course it is possible, though not probable, that he has done this and still is telling the truth. Try him by taking him to the middle of his story, and from there jump him quickly to the beginning and then to the end of it. If he is speaking by rote rather than from recollection, he will be sure to succumb to this method. He has no facts with which to associate the wording of his story; he can only call it to mind as a whole, and not in detachments. Draw his attention to other facts entirely dissociated with the main story as told by himself. He will be entirely unprepared for these new inquiries, and will draw upon imagination for answers. Distract his thoughts again to some new part of his main story and then suddenly, when his mind is upon another subject return to those considerations to which you had first called his attention, and ask him the same questions a second time. He will again fall back upon his imagination and very likely will give a different answer from the first—and you have him in the net.

He cannot invent answers as fast as you can invent questions, and at the same time remember his previous inventions correctly; he will not keep his answers all consistent with one another. He will soon become confused and, from that time on, will be at your mercy. Let him go as soon as you have made it apparent that he is not mistaken but lying." (Wellman, pp. 48-49).

Cox says:—"An excellent plan is to take the witness through his story, but not in the same order of incidents in which he told it. Dislocate his train of ideas, and you put him out; you disturb his memory of his lesson. Thus begin your cross-examination at the middle of his narrative, then jump to one end, then to some other part the most remote from the subject of the previous question. If he is telling the truth this will not confuse him, because he speaks from impressions upon his mind; but if he is lying, he will be perplexed and will betray himself, for speaking from the memory only, which acts by association, you disturb that association, and his invention breaks down. When you are satisfied that the witness is drawing upon his invention, there is no more certain process than a rapid fire of questions. Give him no pause between them; no breathing place, no point to rally. Few minds are sufficiently self-possessed as, under such a catechising to maintain a consistent story. If there be a pause or hesitation in the answer, you thereby lay bare the falsehood. The witness is conscious that he dares not stop to think whether the answer he is about to give will be consistent with the answers already given, and he is betrayed by his contradictions. In this process it is necessary to fix him to time, and place and names.—'You heard him say so?' 'When?' 'Where?' 'Who was present?' 'Name them.' 'Name one of them.' Such a string of questions, following one upon the other as fast as the answer is given, will frequently confound the most audacious. Fit names, and times and places, are not readily invented, or if invented not readily remembered. Nor does the objection apply to this that may undoubtedly be urged against some others of the arts by which an advocate detects falsehood, namely, that it is liable to perplex the innocent, as well as to confound the guilty; for if the tale be true, the answers to such questions present themselves instantaneously to the witness's lips."

Taylor says: "While simplicity, minuteness, and ease are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually laboured, cautious and indistinct. We have, too, more or less conclusive indications of insincerity or falsehood when we find a witness over-zealous on behalf of his party; exaggerating circumstances, assuming an air of bluster and defiance; answering without waiting to hear the question; telling his story glibly and with extraordinary accuracy in language obviously not his own; forgetting facts where he would be open to contradiction; minutely remembering others, which he knows cannot be disputed; reluctant in giving adverse testimony; replying evasively or flippantly; pretending not to hear the question for the purpose of gaining time to consider the effect of his answer; affecting indifference; or often vowing to God and protesting his honesty. In the testimony of witnesses of truth there is, on the other hand, a calmness and simplicity; a naturalness of manner; an unaffected readiness and copiousness of detail, as well in one part of narrative as another; and an evident disregard of either the facility or difficulty of vindication or detection." (Taylor, S. 52).

Powell says: "A witness of truth usually gives prompt, frank answers to all questions whether they tell for or against his side. Even if an untruthful witness shows no signs of weakness in his examination-in-chief, under skilful cross-examination he will usually disclose his latent bias or motive. If he suddenly becomes deaf or dull when awkward questions are asked; if he shuffles or fences with the question, or answers it 'by the card,' then his evidence will be discredited. Nevertheless it must be remembered that demeanour is not conclusive; a truthful witness may create a bad impression while an untruthful one may appear to be frank and honest." (Powell, p. 505).

Alison says: "Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner that he can be brought to let out the truth. Such measures may sometimes terrify a timid witness into a true confession, but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradiction may be reconciled. The *most effectual method* is to examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied or but partially admitted before. In such cases there is no ground on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment can be laid by the jury. Without doubt they come tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth: and it frequently happens that in this way the most important testimony in a case is extracted from an unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal." (Alison's Practice of Cr. Law. p. 43).

There are witnesses who attempt to avoid disclosure of facts or discussion upon a subject by repeating that 'don't know' or 'don't recollect.' They are difficult to deal with.

"Sometimes a witness will not answer. He does not choose to know. He will not remember. He is obstinately ignorant. You are aware that he could tell you a great deal if he pleased, but he has reasons for forgetting. Such a witness will tax your skill and patience. To conquer him you will need as much of patience as of art. The first rule is to keep your temper; the second, to be a resolute as himself: the third to discover his weak place—every person has some weak point through which he is accessible. If you, betray the slightest want of temper, the witness will have the advantage of you, for you will enlist his pride in defence of his determination. If you show that you are resolved to have an answer, you will shake him by the influence which a strong will obtains always over a weaker one, by that wonderful power which persistency never fails to exercise." See Cox's Advocate.

Besides the method of questions tending to divert attention, if the circumstances admit, another method of interrogation may be adopted with equal success and which I may permitted to call, the *digressive method*. In

order to use this method effectively it is necessary to find out some collateral means tending to contradict the facts deposed to by the witness, not in an open manner by eliciting an inconsistent statement from the mouth of the witness, but by extracting something that in effect can be associated with the matter sought for. "Carry the witness away to some distant, and collateral topic and try his memory upon that, so as to divert his thoughts from the main points of your inquiry, and prevent his seeing the connection between the tale he has told and the question you are about to put to him. Then by slow approaches bring him back to the main circumstances, by the investigation of which it is that you purpose to show the falsity of the story. The design of this manoeuvre is, of course, to prevent him from seeing the connection between his own story and your examination, so that he may not draw upon his imagination for explanations consistent with his original evidence; your design being to elicit inconsistency and contradictions between the story itself and other circumstances from which it may be concluded that it is a fabrication." See Hardwick, p. 209.

Sergeant Ballantyne on the cross-examination of a false witness says. The records of Courts of justice from all time show that truth cannot, in a great number of cases tried, be reasonably expected. Even when witnesses are honest and have no intention to deceive, there is a natural tendency to exaggerate the facts favourable to the cause for which they are appearing, and to ignore the opposite circumstances; and the only means known to English law by which testimony can be sifted is cross-examination. By this agent, if skilfully used, falsehood ought to be exposed, and exaggerated statements reduced to their true dimensions. An unskilful use of it, on the contrary, has a tendency to uphold rather than destroy. If the principles upon which cross-examination ought to be founded are not understood and acted upon, it is worse than useless, and it becomes an instrument against its employer. The reckless asking of a number of questions on the chance of getting at something is too often a plan adopted by unskilled advocates, and noise is mistaken for energy. Mr. Baron Alderson once remarked to a counsel of this type, 'Mr.—, you seem to think that the art of cross-examination is to examine crossly.'

"In order to attain success in this branch of advocacy, it is necessary for counsel to form in his own mind an opinion upon the facts of the case, and the character and probable motives of a witness, before asking a question. This doubtless requires experience; and the success of his cross-examination must depend upon the accuracy of the judgment he forms.

Great discernment is needed to distinguish material from unimportant discrepancies, and never to dwell long upon immaterial matters; but if a witness intends to commit perjury, it is rarely useful to press him upon the salient points of the case, with which he has probably made himself thoroughly acquainted, but to seek for circumstances for which he would not be likely to prepare himself. And it ought above all things to be remembered by the advocate, that when he has succeeded in making a point he should leave it alone until his turn comes to address the jury upon it. If a dishonest witness has inadvertently made an admission injurious to himself, and, by the counsel's dwelling upon it, becomes aware of the effect, he will endeavour to shuffle out of it, and perhaps succeed in doing so.

The object of cross-examination is not to produce startling effects, but to elicit facts, which will support the theory intended to be put forward. Sir William Follett asked the fewest questions of any counsel I ever knew: and I have heard many cross-examinations from others listened to with

rapture from an admiring client. Each question has been destructive to his case.

I had put a question to a witness as to what he was doing at a particular time, this being a matter important to the inquiry. 'I was talking to a lady,' was the answer; adding, 'I will tell you who she was if you like. You know her very well.' I made no observation at the time, but when addressing the jury said that my experience led me to the conclusion that honest witnesses endeavoured to keep themselves to the facts they came to prove, but that lying men endeavoured to distract the attention by introducing something irrelevant; and I think this remark is worth consideration, and points out one of the tests of truth or falsehood in the person under examination.

Embarrassment exhibited under a searching cross-examination is not to be relied on as a proof of falsehood: the novelty of the position, or constitutional nervousness, may frequently occasion it.

I have myself succeeded, by cross-examination, in cases where claims were made for injuries received in railway accidents, in showing that the claimant had not been present at the occurrence. Cross-examination has recently become more important than ever in sifting the evidence of professional witnesses in cases where injuries have been sustained from the above class of accidents, and in which the most eminent professional men occasionally fall into grave errors, and I feel obliged to add that some in the lower walks of the profession make the manufacture of these cases a not unprofitable trade. One of these worthies admitted in a recent trial that he might have been engaged in a hundred of them."

The advocate cross-examining a witness should conduct his examination with the testimony of the other witnesses in view, and endeavour, if possible to secure a contradiction by the witness under examination of the other witnesses on whose side he has been called. He should also try to make the witness contradict himself, if he believes that he is lying or is mistaken. No self-respecting advocate will ever try to entrap an honest witness and get him into trouble which may lead to loss of reputation, even if, by doing so, he could win the most important cause. If, however, the witness is not telling the truth, he should be exposed, or, if he is mistaken, his mistake should be explained out of his own mouth, if possible: and if a satisfactory explanation cannot be obtained, the advocate in his argument to the jury may comment with damaging effect on the mistake.

It is sometimes necessary for the advocate to show that certain facts deposed to by witnesses are impossible or at least improbable. The story of Susannah and Elders in the Apocrypha affords an admirable example. The two false witnesses were examined out of the hearing of each other, and on being asked under what sort of tree the criminal act was done, the first said a "mastick tree," the other a "holm tree."

"What had you for supper?" says a modern jurist. "To the merits of the cause the contents of the supper were altogether irrelevant and indifferent. But if, in speaking of a supper given on an important or recent occasion, six persons, all supposed to be present, give a different bill of fare, the contrariety affords evidence pretty satisfactory, though but of the circumstantial kind, that at least some of them were not there." The most usual application of this rule is in detection of a fabricated *alibi*. This seldom succeeds if the witnesses are skilfully cross-examined out of the hearing of each other: especially as Courts and juries



are aware that a false *alibi* is a favourite defence with guilty persons, and consequently listen with suspicion even to a true one.

### Illustrations

(i) In a case of murder, to which the defence of insanity was set up, a medical witness called on the part of the accused swore that in his judgment, the accused at the time he killed the deceased was affected with a homicidal mania, and urged to the act by an irresistible impulse. The judge dissatisfied with this first put to the witness some questions on other objects, and then asked him; "Do you think the accused would have acted as he did, if a policeman had been present?" To which the witness at once answered in the negative; on which the Judge remarked: "Your definition of irresistible impulse then must be an impulse irresistible at all times except when a Policeman is present."

(ii) An amusing incident, leading to the exposure of a manifest fraud, occurred recently in another of the many damages suits brought against the Metropolitan, Street Railway and growing out of collision between two of the company's electric cars. The plaintiff, a labouring man, had been thrown to the street pavement from the platform of the car by the force of the collision, and had dislocated his shoulder. He had testified in his own behalf that he had been permanently injured in so far as he had not been able to follow his usual employment for the reason, that he could not raise his arm above a point parallel with his shoulder. Upon cross-examination the attorney for the railroad asked the witness a few sympathetic questions about his sufferings, and upon getting on a friendly basis with him asked him to be good enough to show the jury the extreme limit to which he could raise his arm since the accident. The plaintiff slowly and with considerable difficulty raised his arm to the parallel of his shoulder. "Now, using the same arm, show the jury how high you could get it up before the accident," quietly continued the attorney; whereupon the witness extended his arm to its full height above his head, amid peals of laughter from the Court and jury. See Wellman p. 253.

(iii) In a case of affiliation of a bastard child, the mother had sworn distinctly and positively to the person of the father, and to the time and place of their acquaintance, fixed, as usual, at precisely the proper period before the birth of the child. In this case, the time sworn to was the middle of May; and the place, the putative father's garden, for an hour the witness endured the strictest cross examination that ingenuity could suggest; she was not to be shaken in any material part of the story, she had learned it well, and with the persistence that makes women such difficult witnesses to defeat, she adhered to it. She was not be thrown off her guard by a question for which she was not prepared, and the examination proceeded thus:—"You say you walked in the garden with Mr. M—?" "Yes." "Before your connection with him?" "Yes." "More than once?" "Yes, several times." "Did you do so afterwards?" "No." "Never once?" "No." "Was there fruit in the garden?" "Yes." "I suppose you were not allowed to pick any?" "Oh yes, he used to give me some." "What fruit?" "Currants and raspberries." "Ripe?" "Yes."

This was enough. She was detected at once. The alleged intercourse was in the middle of May. Currants and raspberries are not ripe till June. In this case the woman's whole story was untrue. She had fallen in with the suggestion about fruit to strengthen, as she thought, her account of the garden. But she did not perceive the drift of the questions,



and consequently had not sufficient self-command to reflect that the fruit named was not ripe in May.

This will serve as an illustration of the manner in which the most astute witness may be detected in a lie. But patience in the pursuit is always necessary. You may be baffled once and again, but be careful never to let it be seen that you are baffled. Glide quietly into another track, and try another approach, you can scarcely fail or success at last. *No false witness is armed at all points.*

(iv) See illustration (v) to Chap. 74 *supra*.

(v) See illustration (i) to Chap. 46 *supra*.

(vi) A stock broker was sued by a married woman for return of certain bonds and securities in the broker's possession, which she alleged belonged to her. Her husband took the witness-stand and swore that he had deposited the securities with the stock broker as collateral security against his market speculations but that they did not belong to him and that he was acting for himself and not agent for his wife, and had taken her securities unknown to her.

It was the contention of Mr. Choate that even if the bonds belonged to the wife, she had either consented to her husband's use of the bonds, or else was a partner with him in the transaction. Both of these contentions were denied under oath by the husband.

Q. "When you ventured into the realm of speculation in Wall Street I presume you contemplated the possibility of the market going against you. Did you not?" A. "Well, no, Mr. Choate, I went into Wall Street to make money, not to lose it."

Q. "Quite so, Sir; but you will admit, will you not, that sometimes the stock market goes contrary to expectations?" A. Oh, yes.

Q. "You say the bonds were not your own property, but your wife's?" A. "Yes, Sir,"

Q. "You even admit that when you deposited the bonds with your broker as collateral security against your stock speculations, you did not acquaint him with the fact that they were not your own property?" A. "I did not mention whose property they were, Sir."

(In his inimitable style.) — "Well, Sir, in the event of the market going against you and your collateral security being sold to meet your losses, whom did you intend to cheat, your broker or your wife?"

The witness could give no satisfactory answer, and for once a New York jury was found who were willing to give a verdict against the customer and in favour of a Wall Street broker. See Wellman, p. 66.

(vii) Once a suit was filed in the Chancery Court at Knoxville, against several people as sureties on the bond of an insurance agent. In that suit a certain theory was set up. Then the plaintiff brought another suit in a different Court; but it was on an entirely different theory from the case pending at Knoxville, in Chancery. The man was put on the stand to testify in the latter case, and his testimony was in direct conflict with his plaint in the Chancery Court at Knoxville. In a few mild questions, I clinched the nails on that evidence, so that he could not back out of it. Fortunately I had brought with me the plaint that he had filed at Knoxville, and after I had clinched that so that he would not get away from it, I walked around in front of him. He was

one of the most prominent men in those parts. Showing him the plaint, I asked :

"Is that your signature to this plaint ?" — "Yes".

"Did you swear to it before a notary public ?" — "Yes".

"Well, then, Major Smith, kindly tell this jury where it was that you swore to a lie. Was it at Knoxville, or was it here before this jury, or was it in both places?" As I started back to my seat, I heard a disturbance behind me, as I turned hurriedly to see what was the cause, the sheriff had caught the witness as he was falling to the floor in a faint. There was no other question asked. The Court adjourned and pretty soon they came in and dismissed the case." 14 Cr. L. J., p. 27.

(viii) If a witness is manifestly lying, leave him entirely alone. "Whenever there is developed in the case crookedness or incompatibility or discrepancy or something contradictory, let it alone right there." See 14 Cr. L. J. 28.

Thus in case of child murder, evidence was that the child alleged to have been poisoned by continuous dosing with laudanum, appeared happy and was never heard to cry. Sergeant Ballantyne cross-examined.

Q. "You say the child was always quiet ?" A. "Yes."

Q. "Quiet - quiet as the grave."

With this remark the counsel sat down. See 20 M. L. J. 157.

(ix) In a case of murder, the case for Crown was that prisoner had come to the house of the witness one evening carrying a sack, that he had opened the sack, and showed in it the dead body of a man called Jones, that he had said that he had killed Jones, and was going to bury the dead body in some waste ground. A year or so afterwards, the body was found in the waste ground and the chief witness told his story. The defence was that the story was concocted and too ridiculous to be believed.

The cross-examination proceeded thus :—

Q. "Now you have told us all about the sack and the burial, and told us that when prisoner left your house, he whistled. Do you remember what tune he whistled ?" A. "I don't know."

Q. "Let me suggest its name. Was it 'Now We Shan't be Long ?'" (The title of then popular song.) A. "No."

Counsel. "What, you don't know ? Well, surely, it must have been."

There was no further comment and the accused was acquitted. See 20 M. L. J. 232.

(x) Plaintiff brought a suit for possession of a large estate, claiming it on the ground that it was owned by his uncle B, who died in the Jallianwala Bagh firing, and who was childless. He produced two witnesses who deposed that they were with B in the Jallianwala Bagh at the time of firing and that he received a bullet wound and died, and that both of them out of fear ran away. Cross-examined :

Q. How many people were there in the Bagh (garden) ?

A. Several thousands.

Q. What time did you reach there ? A. At about noon, say, 12-30.

Q. How long did you remain there? A. About half an hour.

Q. There were many flower plants in the garden? A. Yes.

Q. And fruit trees? A. Yes. There were hundreds of fruit trees of different kinds.

Q. What fruit trees did you see? A. Mangoes, bananas, pomegranate.

Q. And there were fruits on the trees? A. Yes. There were oranges and other fruits.

Q. And they were ripe? A. Yes.

It was shown that (1) in the Jallianwala Bagh there were no fruit trees. (2) That oranges are not to be found in the month of April when the firing took place. (3) That the time of the firing was incorrect.

The falsehood of their testimony was thus exposed.

(x) In a case on a bond, a witness for the defendant was introduced who testified that the defendant had taken the amount of the bond, which was quite a large sum, from his residence to that of the obligee, a distance of several miles, and paid him in silver in his presence. The evidence was totally unexpected for the plaintiff's counsel; his clients were orphan children, all their fortune was staked in this case. The witness had not yet committed himself as to how the money was carried. Without any discomposure, without lifting his eyes or pen from paper, counsel made on the margin of his notes of trial a calculation of what the amount in silver would weigh. When his turn to cross-examine came, he calmly proceeded to make the witness repeat his testimony step by step—when, where, how and how far the money was carried, and then asked him if he knew how much that sum of money weighed and upon naming the amount so confounded the witness, party and counsel engaged for defendant, that the defence was at once abandoned, and a verdict for the plaintiff rendered on the spot. *See Sherwood's Legal Ethics.*

(xii) An attorney for the defendant was examining the complainant in a certain case.

His client, one Wheelock, had got into a quarrel with a certain McDonald, during their negotiations for the trade of horses. The quarrel had gone so far that McDonald had made an application to a Magistrate to have Wheelock bound over to keep the peace, alleging that he had threatened to do him, McDonald, bodily injury.

When the case was called, McDonald testified to the circumstances under which Wheelock had threatened him. The cross-examination began as follows:—

Q. "Now, Mr. McDonald," the lawyer said, "you declare that you are under the fear of bodily harm? A. "I am, Sir."

Q. "You are even afraid of your life?" A. "I am, Sir."

Q. "Then you freely admit that Wheelock can whip you, Pat McDonald?"

The question aroused McDonald's "Irish" spirit instantly.

A. "Will Wheelock whip me? Never! I can whip him and any half dozen like him!"

"That will do, Mr. McDonald," said the attorney.

The Court was already in a roar, and the lawyer rested the case without further testimony or argument. The case was dismissed, for it was evident that McDonald could not be under serious bodily fear of a man whom, in his own opinion, he had only to use one-seventh of his strength to whip. See 25 M. L. J. 87.

(xiii) See illustration (ii) Chap. 62.

(xiv) A good instance is afforded by the case of the Comte de Morangies "The question was whether Monsieur de Morangies had received a sum of 300,000 francs, for which he had given notes of hand to a person called Veron. These notes of hand, he affirmed, had been obtained from him fraudulently. Dujonquai, grandson of Veron, affirmed that he had himself on foot transported that sum to Morangies, at his hotel, in thirteen journeys between seven in the morning and about one in the afternoon, making about five hours and a half or six hours. The fact was shown to be impossible as follows:—Dujonquai said that he had divided the sum in thirteen bags, each containing six hundred louis, and twenty-three other sacks of two hundred pounds; twenty-five louis were given to Dujonquai by Morangies. On each occasion Dujonquai put a sack of two hundred louis in each of his pockets, which, according to the fashion of the day, flapped over his thighs, and took a sack of six hundred guineas under his arm. According to the measured distance from the alley in which Dujonquai lived to the house of Morangies, the space traversed by Dujonquai in his thirteen journeys would amount to five French leagues and a half, the time for each league being calculated at an hour for a person walking rather faster than usual. So far there is no absolute physical impossibility, however improbable it might be that Dujonquai should not stop a moment for refreshment or repose; but in going, Dujonquai had sixty-three steps to come down in his own house, and twenty-seven to go up at that of Morangies, making in all ninety multiplied by twenty-six: this amounted to two thousand three hundred and forty steps. Now it was known that to ascend the three hundred and eighty steps of Notre Dame from eight to nine minutes are requisite. Thus, an hour must be deducted from the five or six during which the journeys were said to have been made. The street of St. Jacques, which Dujonquai had to ascend, is extremely steep. This would check the speed of a man laden and encumbered with bags of gold under his arm and in his pocket. The street is a great thoroughfare, especially in the morning, for three to six hours. The obstructions inevitable from this circumstance would accumulate considerably; half a league at least must be added to the five leagues and a half which, as the crow flies, was the distance traversed. It happened that on the very day which Dujonquai fixed upon for his journeys, these ordinary obstructions were increased by the removal by sixty or eighty workmen of an enormous stone to St. Genevieve, and by the crowd attracted by the spectacle. This must, even supposing him not to have yielded for a moment to the curiosity of seeing what attracted others, have added seven or eight minutes to each of his walks, which in the twenty-six, would amount to two hours and a half. Both in his own house and that of Morangies it must have been necessary for Dujonquai to open and shut the doors to take the sacks, to place them in his pockets, to take them out, to lay them before Morangies, who he affirmed, contrary to all probability, counted the sacks during the intervals of his journey, and not in his presence. Time must have been requisite also to take and read the receipts given by the Court, during each journey. On his return home Dujonquai must have given them to some other person. Therefore, reckoning the time required to take and lay down the sacks, to open

and shut the doors, to receive and read and deliver the acknowledgments, to conversations which Dujonquai admitted he had with several people, together with the obstacles we have mentioned the truth of Dujonquai's statement was reduced to a physical impossibility." See Best, S. 625.

(xv) Lord Alverstone tells this story of a distinguished English novelist and a hard-working barrister by the name of Codd, who had a large family and was always struggling in his profession. In a post office prosecution tried before Baron Bramwell at the Chelmsford Assizes, Codd was defending the prisoner. Among the witnesses was Mr. Anthony Trollope, the well-known novelist. He knew nothing about the facts of the particular robbery in question, but having an official position in the post office, he was called to prove the practice in the post office as to the sorting, removing and otherwise dealing with the letters, so that the jury might understand what opportunity the prisoner had for committing the theft. I need not say that in such cases the witness is, as a rule, not cross-examined, but makes his statement and leaves the box. Accordingly Mr. Anthony Trollope, to whom Bramwell had nodded, was leaving the witness-box, when Codd, who saw an opportunity for making a point, said: "Stop a moment, Mr. Trollope." Trollope came back.

"What are you, Mr. Trollope?" said Codd.

"I have already told the Court that I am a supervisor in the post office."

"But are you anything else?"

Trollope replied, "Yes I am an author."

"Ah," said Codd, "you are an author, are you? What was the last book you wrote?"

"Barchester Towers" or whatever it was—the particular book is immaterial.

Q. "Well then, was there a word of truth in that book from beginning to end?" A. "I do not understand what you mean."

Q. "You can answer a plain question: Was there a word of truth in that book from beginning to end?" A. "It was a work of fiction."

Q. "Fiction or not, was there a word of truth in it from beginning to end?" A. "Well, if you put it in that way, there was not."

Codd said: "Thank you Mr. Trollope," and sat down. He called no witnesses, but made a violent speech to the jury in which he asked them how they could possibly convict the prisoner on the evidence of witnesses, when the principal witness was a man who was obliged to admit that he had written a book without a word of truth in it.

(xvi) The following incident regarding Sir Rufus Isaacs' first appearance in wig and gown, is told by him to a company of law students not long after he became a K. C. The incident was in a county Court case in which he represented a fruit merchant who was being sued by a costermonger. This costermonger, who alleged that some boxes of figs he had purchased were unfit for human food, grew angry under Mr. Isaacs' cross-examination. "Look you here, Guv'nor," he exclaimed, "some of these figs are in this Court and if you eat three of them and, not vomit in five minutes. I'll give up the blooming case." The county Court Judge thought that Mr. Isaacs ought to make the experiment, but the young advocate, resourceful then as now, suggested that it would be more fitting for his client to accept the challenge:

"What will happen if I don't eat the figs?" whispered his client, the fruit merchant. The future Attorney-General told him that judgment would probably be given against him. "Then I'll lose the case," was the unhesitating reply. The challenge was not taken up and the case was lost. See 20 M. L. J. 472 (Jour).

(xvii) Squire Melton who was a high-toned and high-standing person was examined by the defendant in a case, as a witness. He was turned over to Colonel Netherland for cross-examination, and he did it in this style.

Q. "Squire Melton, you are a brother-in-law of the defendant?"

A. "Yes."

Q. "This evidence of yours—did he get it up; or was it a scheme of yours?" A. "It was a scheme of my own."

The counsel asked the witness to stand aside. 14 Cr. L. J. 27.

(xviii) "I remember a great many years ago I was trying a law suit up in Fentress county, in the big city of 'Jimtown.' A Mrs. Phillips was a witness. They had prodded her and prodded her, and every time they hit her she would make a fresh jerk and tell something more: then they would hit her again, and she would make another effort. Finally the lawyer got tired and turned her over to our side. I said: "Mrs. Phillips, there is just one question: Mrs. Phillips, before you went on the stand as a witness, didn't you swear that, in this case, you would tell the truth, the whole truth, and nothing but the truth."

"Yes, sir," she snapped at me.

"Well, do you think you have kept the contract?"

"Yes sir," was the answer "and a little more."

How many beautiful question a young lawyer could think up to ask that witness—astonishing questions, as thick as blackberries. My question was "Stand aside." We did not hear anything more from Mrs. Phillips, nor of her evidence. See the name cited in 14 Cr. L. J. 27.

## CHAPTER 86

### Of Finger Print Expert

The science relating to finger impressions has reached a stage of perfection. An expert in finger print can always successfully compare two impressions, if they are not blurred or dim or otherwise interfered with. A number of crimes have been detected by the fact that the criminal left the finger impression on certain articles, while opening a box, or handling some other household furniture.

As to the judicial decisions on the value of the testimony of finger print expert, see the following:—

Finger impressions include thumb-impressions. 3 C. W. N. 90. Similarity of finger impressions is, as a rule, evidence of personal identity and their dissimilarity will be evidence of the reverse. 1 C. W. N. 33. Opinion of expert as to identity of palm impression is admissible. 52 B. 223: 1928 Bom. 158: 29 Cr. L. J. 410: 108 I. C. 508: 30 B. L. R. 321. Conviction can be based on the uncorroborated testimony of a finger print expert. 1931 C. 441: 133 I. C. 111: 35 C. W. N. 863: 32 Cr. L. J. 1001. See 9 Mys. L. J. 444. Opinion of thumb-mark expert is conclusive. 9 P. R. 1914 Cr. Evidence of

finger print expert can be accepted by Court without corroboration. 1936 B. 151 : 60 B. 187, 4 L. 246 : 1923 L. 622 and 1922 P. 73 Not Foll. 1923 M. 178 : 46 M. 715 Ref. Under S. 73 Court has power to ask accused to give his thumb-impression for comparison. 1932 B. 406, 1924 R. 115 Foll. 1928 P. 129 : 28 Cr. L. J. 850 : 6 P. 305, 1926 C. 531, 46 M. 715 : 1923 M. 178, 1928 P. 103 : 6 P. 623, 1922 P. 73 : 1 P. 242, 1927 M. 696 : 50 M. 462.

### Illustration

In this one Edward Meldon was charged with the murder of one Mr. Crostic and the important evidence against him was that of an expert to the effect that there were the finger-prints of the accused found in blood by the side of the murdered man. The case looked very black when Mr. Sheldon, counsel for the accused, rose to address the Court. He admitted that there was no evidence with which to controvert the theory that it must have been the finger-prints of Edward Meldon that had been found beside the murdered man. He called Thomas Lane (the expert, engaged by the prosecution) as his first witness, and the Court attendants began to pass around the room drawing down the heavy shades that served to darken the room when the lantern was used. Sheldon waved them aside.

"At present I do not desire to use the lantern," he said, quickly. "I wish to interrogate Dr. Lane on other matters."

Lane had figured so prominently as one of the expert witnesses that it had been suggested that of course Sheldon had called him to the stand to controvert his own testimony. The first question fell upon the ears of the spectators as a shock.

"I wish to ask you," said Sheldon, "is your relations with the deceased Mr. Crostic were pleasant?"

"Entirely so," said Lane. "I do not know why they should be otherwise."

Q. "Is it not a fact that you proposed marriage to Miss Krostic some time ago?" A. "I did."

Q. "And were told that she was already engaged to marry the defendant?"

"I believe the answer was something of that sort," was the reply, in a tone so low that those at the rear of the room could not catch the answer.

Q. "And was it not you who told Mr. Crostic that the accused had been a frequenter of a certain disreputable resort in the city?"

Lane shifted uneasily in his seat. The prosecution objected to the question, but the Judge sustained Sheldon, and finally, in a halting manner, Lane spoke.

A. "I might have said that I did not think that Meldon had done sowing his wild oats. I think I did not mention any particular resort."

Q. "Yet the prisoner, Mr. Crostic said that you were his accuser?"

A. "I know nothing of that, Mr. Crostic cannot speak for himself"

Q. "Where were you on the night of the murder?"

A. "At my office all the evening. I had occasion to call up several persons on the telephone. They can substantiate my statements if that's what you are driving it."

"That will be all," said Sheldon. Then he asked that all the room might be darkened, and called to the stand one of the police experts who had already testified for the prosecution.

"You have told the Court" began Sheldon, "that there can be no possible error in the identification of the thumb-marks found upon the sheets of Mr. Crostic's bed with those of the defendant. That is so, is it not?"

A. "Entirely so. No two thumb-marks are ever exactly alike. The prints on the sheet are remarkably clear. There is no room for error."

"I wish you would make a print of my thumb," said Sheldon.

The expert handed down a glass slide, and presently threw upon the screen the result.

"That is not in the least like that of the accused"? said Sheldon, questioningly.

"Not in the least," was the prompt reply. "Even a layman can see the difference."

"And yet," said Sheldon, "if you will let me have another slide—." He pressed his thumb upon the glass and presently it was flashed upon the screen.

A gasp ran through the room as it was realized that the two prints were entirely unlike.

"Is that like the other?" demanded Sheldon smilingly. The expert shook his head.

"Not a bit like it," he admitted.

"Is it like the print you made of the hand of Herman Battle?" asked Sheldon.

The expert fumbled in his case, and presently threw a second print on the screen. They were identical.

"Let's have a third trial," suggested Sheldon. "Be particular to see that the glass does not pass from your possession."

Every one in the court-room pressed forward in his seat to see the test. Presently this, too, was thrown upon the screen.

"Is it not the print of the accused's thumb?" he asked.

The crowd exclaimed with excitement. Even to the scar, the print was the same.

"That is the print of the prisoner's hand," agreed the expert, "I would know it among a thousand."

"And yet the prisoner has not left the dock," reminded Sheldon.

"I cannot understand it," was the puzzled response. "It is not reasonable that you should be able to change the prints at will."

"If we may have a little light I will enlighten the Court," was the response. "It is all perfectly simple."

In the stillness the green shades were sprung up with a snap that sounded like a roar. For a moment, every one blinked as the strong light blinded their eyes. Sheldon turned towards the jury-box.

"You will recall," he began eventually "that some few weeks ago as estimable citizen of this town was accused of burglary. A safe had been



drilled open, and on the window sash were found prints of a finger stained with oil and the dust from the boring.

"These prints were found to be those of Herman Battle, who is now waiting trial for that offence.

"Mr. Battle was not near the scene of the alleged burglary that night. He was an old friend of the accused's father, and consented to aid us in an experiment. Because no finger-print is ever duplicated by Nature there has existed no doubt but that Mr. Battle was the offender, and yet the real offenders, if they are such, are Mr. Twining, junior counsel in the case Miss Crostic, Miss Meldon, and myself.

"It was desired to show that while the peculiar markings of the cuticle of the hands is never exactly duplicated, it is entirely possible to take advantage of this fact to fasten upon an entirely innocent person the blame for a crime.

"It is well known that for several years Dr. Lane has had a fad for studying finger-print identifications. He has been called as an expert witness in numerous cases in this and other states and it was to him that I first returned for information when I returned home and found that the accused had been put in jeopardy of his life on account of a few finger prints on a bit of cloth.

"But I also found that Dr. Lane carries his studies further than most. He not only makes collections of prints, but of the fingers making these prints.

"He did not call my attention to them, but I perceived that he had a large collection of casts of hands. From the accused I learned that he had given Dr. Lane permission a few months ago to make a cast of his hand, but that only the thumb had come out clearly.

"From the experiments I made I found that it would be entirely feasible to reproduce these casts in other materials than plaster—in the composition used by printers to ink their forms, for instance.

"The prints made by me before the Court were made from these casts, just as were the prints on the linen placed in evidence. Dr. Lane has admitted upon the stand that he was refused by Miss Helen Crostic when he made a proposal of marriage to her. With her father dead and her lover hanged for his murder, there might have been a possibility of her re-considering her determination.

"At the same time Lane supposed that the death of Mr. Crostic would free him from the payment of certain obligations he contracted and which he supposed were in the possession of the deceased, though in point of fact they are in my safety deposit box in the city.

"He prepared a composition stamp and carefully left behind the evidence that would incriminate his rival, while he established a telephone *alibi*. I demand the arrest of Thomas Lane for the murder of John Crostic."

All eyes were turned on Lane, who sat at the rear of the room, one of the Court attendants went over to him and laid a hand on his shoulder. As he did so the body lurched forward and fell to the floor. Another physician sprang forward and bent over the body for an instant.

"Hydrocyanic acid," he said tersely. "Pure Prussic acid The man died instantly."

The Judge glanced at the prosecuting attorney. The latter nodded, the Judge's gravel fell.

"The prisoner is discharged," he said shortly. "The case has been taken to a higher Court."

While the spectators rushed out to be the first to tell the news, Sheldon went towards Ned. Their hands clasped in silence as they stood there for a moment.

"I feel almost like a murderer," said Sheldon wearily. "Let us go to Elizabeth. I need her." See 16 M. L. J. (Jour.) 434-439.

Reader is referred to Ch. 10 of author's "Law and Methods of Police Investigation 1947".

## CHAPTER 87

### Of Foot-print Expert or Tracker.

In India, there is hardly any good tracker or foot-print expert. Generally we find a clever person with a doubtful character in a village, who is an associate of the thieves and other criminals and who is also a friend of the Police, in dubbed as a tracker. He is, as a rule, an illiterate person and has never studied the science. He never measures a foot-print by any foot rule, but describes its length by measuring it with his fingers, e.g., 14 fingers, 16 fingers, etc. His evidence is generally of flimsy character and should be very carefully scrutinized.

Foot-prints are often of decisive importance, but we must know how to observe, preserve and utilise the impressions in order to be able to get any good out of it. As a rule foot-prints are but seldom found where they are wanted. When they exist, they are rarely entire and complete, and for that reason are considered of no value. As regards really clean foot-prints, it seldom happens that they are preserved so as to remain intact, or to inspire certainty that they have some connection with the case. People who have come upon the scene of a crime after it had taken place also leave traces of their feet, fouling the important print, so that one can no longer tell which is the significant foot-print and which the useless one. When well-preserved traces do exist, the essential thing is to be able to interpret them and to know how to make good use of them. On this science is dumb and has hardly even approached the question. A foot-print is an impression like other impressions and it is not always well defined and when it is defined one cannot take it away with one; even if one could, it would be impossible to search the whole town and make experiments with every citizen to see if he is the author of the crime. These considerations detract from the value of foot-prints. See Criminal Illustration by Hans Gross 1934 Ed. p. 320.

It is unsafe to rely completely on the evidence of trackers as to the correspondence of tracks. 65 P. L. R. 1917; 40 P. W. R. 1917 Cr.: 42 I. C. 129; 18 Cr. L. J. 897, 71 P. L. R. 1910. Track evidence of flimsy nature cannot be believed without sufficient corroboration. 91 P. L. R. 1915; 10 P. W. R. 1915 Cr.: 27 I. C. 346; 16 Cr. L. J. 222. Identification of foot-prints of accused with shoes is valueless, as there can be a large number of similar shoes. 73 I. C. 331; 5 L. L. J. 87; 24 Cr. L. J. 587. A tracker found the tracks of accused near the dead body which was discovered at his instance. There was no motive for murder. Held, that the evidence is not sufficient for murder though ample for a conviction under S. 201, I. P. C.

1928 L. 476 : 112 I. C. 347 : 29 Cr. L. J. 109. It is impossible to base a conviction merely on the track evidence when the main evidence is extremely discrepant and highly unsatisfactory. 96 J. C. 493 : 27 Cr. L. J. 9-6. Tracks, measured three days after the murder and tracker examined after twelve days are of no value, the peculiarities of foot-prints would in the probability be obliterated by the physical forces of nature. 1932 L. 557 : 33 P. L. R. 691. The mere fact that the track of accused were carried to their village and that accused were known bad characters, held not sufficient to support a charge of dacoity. 33 P. R. 1868 Cr. Before regarding expert's opinion as to foot-prints found near the dead body as conclusive evidence against the accused in murder case, Judge should form his own opinion regarding identity of foot-prints of accused. 1941 Mad. 88. Expert in foot-prints are not recognized by Evidence Act yet Court can consider the evidence of tracker. But his evidence is not sufficient to convict accused. 43 Cr. L. J. 702 but see 43 Cr. L. J. 308. For illustrative cases and technique of foot-prints see Prem's Law and Methods of Police Investigation 1947 Ch. 9.

## CHAPTER 88.

### Of Handwriting Expert and as to Forgery of Handwriting.

#### *Bias of Handwriting Expert.*

The evidence of handwriting expert does not stand on a higher footing than that of an expert in other branches, *i. e.*, medical surgery, etc. It has got all the flaws and weakness that are usually found in all expert opinions. The evidence of handwriting expert is usually biased in favour of the party producing him. Hardly any weight is given to the evidence of an expert because he comes with a bias in his mind to support the cause in which he is embarked. Moreover in view of increasing number of experts in handwriting it has generally been found that parties to the suit produce a number of expert witnesses on both sides. Both sets of witnesses give absolutely contradictory opinions with regard to the questioned document. It has, therefore, been held by the Courts that evidence of an expert is of little value when it is contradicted by another witness. See 1933 Lah. 885 : 144 I. C. 497, 1939 Oudh. 213, Wrottesley, p. 93. Expert witness has been defined to be "a man who is a paid retainer to make a sworn argument." 27 Amer. Law Reg. (iii) footnote The statements of experts should be regarded as advice rather than as evidence and no judge or jury should accept their statements without exercising an independent opinion. See 20 M. L. J. (jour.) 372-373.

#### *Characteristics of Handwriting.*

In order to be able to cross-examine a handwriting expert efficiently, a lawyer must know the various characteristics of handwriting and should be fully conversant with the methods employed by an expert to detect forgery in a document. Several characteristics which go to make up writing habits may be stated to be finger movements, pen presentation, pen pressure, style, direction, execution, alignment, arrangement, sizing, spacing and curves :—

**Alignment.**—Alignment in handwriting is the tendency that lines of writing possess in moving towards the end of the paper from left to right as in English or right to left as in Urdu. Alignment of writing may be classified as ascendent, descendent, even, irregular and arched.

Speaking generally writing done with the elbow as pivot or centre of lateral motion tends to an even alignment, while writing done with wrist as pivot tends to an arched alignment. Forgers of free hand type of imitation frequently have a tendency to an ascendent alignment. "*Identification of Handwriting and the Detection of Forgery*" by Charles Hardless, Ed. 1914, pp. 57—59.

*Arrangement.*—Arrangement which is the next or closest characteristic to alignment, is the relation of letters and characters in words in regard to each other. Extreme regularity of arrangement of letters is found as in print, when if two parallel lines, the width of the letter, are drawn one above and the other below the writing the tops and bottoms of the letters would touch both parallel. *Ibid*, p. 60.

*Sizing.*—Sizing as a writing characteristic means the relative sizing of letters in words in regard to one another. Sizing may be classified as regular or irregular, wide or narrow and large medium or small, very large, and microscopic being the two extremes. Sizing of letters is often dependent on the style and execution—the linear style used adopting itself to large letters and the oval and round style to medium and small sized letters. In rapid writing the sizing is generally small. *Ibid*, pp. 63—64. Sizing has importance as a characteristic owing to the fact of its being automatic, and it will be found that writers maintain their relative sizing of letters in words, whether they write them large or small. Sizing can be measured by means of a scale and compass. *Ibid*, p. 67.

*Spacing.*—Spacing is the interval or distance between lines, words and letters in writing and is intended to distinguish one from the other. In actual experience writings are regularly or evenly or irregularly spaced. The spacing may be extravagant, wide, medium, close or cramped. There can be no fixed rule as to the exact width of spacing which should be observed between letters and it necessarily varies with the sizing and style of the writing adopted. To judge the space between two words, as pointed out by Rexford distance should be measured from letters to letters and not from the end of the final stroke to the beginning stroke. Spacing obtains importance as a characteristic in handwriting because it becomes automatic. Spacing plays a very important part in disputed writing as for instance in the case of anonymous letters. *Ibid*, p. 68.

*Pen presentation.*—Pen presentation or the mode of presenting the pen to the paper, is determined by the angle at which the pen is held towards the paper when, according to the individual habit in writing, both nibs and points of the pen press evenly on the paper. Accordingly if a line be drawn continuously for a space with both points of pen touching the paper with equal pressure, the angle of this drawn line with the horizontal base of the line of writing is the angle of pen presentation. Such angles in ordinary writing may vary from the vertical, or 90 degrees, to the horizontal or 180 degrees. Pen presentation is allied with execution and direction in writing. A vertical pen presentation accompanies slow writing and upright direction, while in an angular presentation the pen points about themselves more to the line of writing, so the execution can be rendered rapid and the direction inclined or sloping. *Ibid*, pp. 68—69.

*Pen pressure.*—Pen pressure is the force applied, by means of the

muscles of the thumb and fingers to writing instrument when guiding it over the writing surface. Pen pressure can be classified as light heavy, medium, even or uniform and shaded. Light pressure fine, narrow stroke and curves, while heavy pressure produces broad, dense, heavy strokes and curves. Medium pen pressure as usually employed in rapid writing produces strokes and curves which are neither fine nor heavy but of even thickness, and regularity in pen breadth. Pen pressure affects writing in various ways. When, for instance, in writing with a vertical pen presentation, pressure is applied with equal force to both nibs or pen points, the vertical down strokes will be found to be heavier, broader and more shaded in execution than any of the other strokes in writing, with the resultant of an opposite effect in regard to the up vertical and horizontal strokes which, as affected by the position of pen points, become the finest, lightest and least shaded lines or strokes in the writing. A writer who usually writes with an even pen pressure can change pictorial effect of his writing by employing a heavy pen pressure without altering the form of his letters in any way. In judging handwriting care should be given as to the form, intensity, frequency, and exact location of the shadings caused by the pressure of the pen. *Ibid*, pp. 70—73.

**Curves.**—Curves in handwriting from a very important characteristic in regard to the identification of handwriting because the difference is in the muscular co-ordination and differing responsive actions of the thumb and fingers which produce curves, are manifested each in their own peculiar way in writers. *Ibid*, p. 73.

**Movement.**—Movement is the action or combined action in the execution of characters and their combination by the muscular capacity of the arm, forearm, hand and fingers. Finger movement produced by the muscular action, i. e., the extension and contraction, of the thumb, first and second fingers, the hand and the arm remaining stationary, except for lateral motion. Finger movement writing is usually shaded, slow, formal, and without dash or flourish and is most susceptible of forgery or imitation. *Ibid*, pp. 45-46. In finger movement writing the pen scope naturally is very limited, the hand being the pivot, and the writers of this movement are generally unable to write a word or combination of more than 5 letters or characters in a single operation. Writing done by the wrist movement, as is generally the case with women is usually angular. When intialling only has to be done the combined forearm and wrist movement is generally employed by writers of this class but in writing and making full signatures the forearm and wrist are combined with the thumb and fingers in simultaneous action, when the signature is generally with well-pronounced curves of easy and natural appearance and is difficult of imitation. It is in signatures of this movement, that the forger possessed only of or employing the finger movement necessarily fails. *Ibid*, p. 50.

**Style.**—Style as a characteristic in writing, may be classified as linear, oval, round, angular and square with their combinations. Style is frequently dependent on the movement employed by the writers. The linear style of penmanship taught in modern schools consists of the down strokes being nearly perpendicular and is usually employed in cases where clear writing is required, such as on telegrams and addresses on envelopes and labels. When a degree of ovalness is added to the linear style in English handwriting, what is termed the 'Legal' style is produced, so called because it is largely employed by solicitors' clerks. It is also known as the 'Civil Service hand.' In

this style the writing is easiest performed with the combined action of the finger and wrist, the finger predominating. *Ibid*, p. 51. Speaking generally in regard to the vernacular writings of India, Hindi may be classed as linear in style, Telegu, Canarese and Malayalam as round, Urdu as oval, Mahajani as angular and Gurmukhi as square, but individual cases can be different and the writing combinations of two or more styles. Bengali is usually a combination of linear and oval and Uriya a combination of linear and round, yet individual cases of these writings may be of other styles. *Ibid*, p. 52.

*Execution.*—Execution or speed in writing which may be laboured slow and drawn, slow and deliberate, average, rapid and very rapid depends to a great extent on the degree attained by the writer towards development of reflex capacity, that is the capacity of transmitting into writing thoughts or words without the intervention of consciousness or volition power, when the writing becomes what may be termed rapid. There is no hard and fast rule for casual observation by which speed can be accurately determined. *Ibid*, p. 53.

*Direction.*—Direction or slant in writing frequently helps to determine execution. In cases where the writer deliberately distorts his own signature so as to repudiate it subsequently, the style of varying the execution is distinct from that of the forger imitating a signature. In the former case slowness or deliberation is frequently seen in all the lines and curves of the writing, whereas in the latter case slowing down is found in some parts and not in others, according to the portions the forger experienced difficulty in imitation. *Ibid*, p. 55. The importance of writing characteristics is recognized by all handwriting experts and it is sound because two different persons have not got the same movements naturally, and in fact there are some advanced movements that a writer of a poor class cannot attain. It is also correct not to pay undue attention to the mere shape of letters because it can be imitated and on the other hand persons do not always make a letter in the same shape, for instance, most people have more than one way of making say a "I." On the other hand, even the shape of letters cannot be disregarded for obvious reasons. There are many ways of making one particular letter, but the same writer does not use all of them and if therefore it is found that in different writings the forms of the letters differ, it is not unlikely that the writer was the same unless for some special reason he altered his natural writing. 1939 O. 17.

#### Value of Evidence of Handwriting Expert.

The evidence of an expert is not infallible. The statements of expert should be regarded as advice rather than conclusive piece of evidence and no Judge of jury should accept their statements without exercising an independent opinion. See Law Journal cited in 20 M. L. J. 372-73.

The following cases illustrate the value of the testimony of an expert as held by various Courts in India:—Expert opinions must always be received with caution, especially the opinion of the handwriting expert. 1931 O. 298: 132 I. C. 259. An expert, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of the opposition on the part of the other side is apt to create a spirit of partisanship and rivalry. Besides, an expert is often called by one side because it has been ascertained that he holds views favourable to its interests. 1933 L. 885: 144 I. C. 497, 1933 L. 561; 144 I. C. 331, 59 I. C. 220. Of all kinds of evidence

admitted in a Court, this is the most unsatisfactory. It is very weak and decried. 1931 L. 408, 64 I. C. 234. Experts, like lawyers, differ in their opinion, and it is in the highest degree unsafe to rely upon the expert evidence when the admitted facts lead to a contrary conclusion. 56 I. C. 879. It is settled practice of Courts not to base the findings merely on expert opinion. 36 M. 159, 8 I. C. 93, 5 I. C. 355, 2 I. C. 154. Mere resemblance between two writings is not sufficient to create the conviction that they are written by one and the same person. 49 C. 235, 64 I. C. 234, 5 I. C. 355. There may be cases where handwriting is of such a peculiar character that the conclusion as to the identity of the writer is almost irresistible. 35 M. 159. The evidence of handwriting expert ought not to definitely point out that anybody wrote a particular thing. He can only point out similarities to the Court, which has to determine whether a particular writing is to be assigned to a particular person. 1921 P. C. 168. The evidence of an expert in handwriting is of little value when contradicted by that of another. 1933 Lah. 885. Where the expert does not know the language in which the signature is made, his opinion is of little value though it can be used to corroborate other evidence. 1937 P. 559. When both sides produce experts who support their case, the value of expert evidence is highly diminished. 1939 O. 213. "The ability to cross-examine professional expert witnesses well, is rare. It has been the habit, of late to speak lightly of the testimony of this class of witness and some of the Courts of last resort in some of our states have very plainly intimated that they consider the testimony of this class of witnesses very unreliable. And in one of our leading law magazines a professional expert witness has been defined to be "a man who is paid a retainer to make a sworn argument." While expert witnesses are often biased in favour of the side by which they are called and show great zeal in endeavouring to substantiate the propositions contended for by it, we are inclined to believe that as a general rule too little weight is given to the testimony of experts. The time has been when, perhaps it was given too great a weight by the Courts, but we are constrained to believe that some of the utterances of our Judges have not been weighed with due care when speaking upon this subject.

The only safe way for an advocate who has an expert to deal with upon cross-examination is to hold him down to the issues involved and not allow him to cover too much ground; and above all not to stage the case of the party who has called his services in to requisition. Experts are as a class shrewd and cunning and are usually selected on account of their eminence in their professions, or skill, their avocations and they are presumed to speak guardedly and carefully upon topics with which they have the greatest familiarity for they often stake their reputation upon the result of the trial in which they are called to testify. Hence the advocate whose duty it becomes to examine witnesses of the kind cannot come to the performance of his task with too much information upon the subject under investigation.

The best method of examining witnesses of this character is to take advantage of their enthusiasm in the cause of the party whose side they are to maintain and quietly and gradually lead them to an extreme position which can neither be fortified or successfully defended. They usually take pleasure in imparting their knowledge to others while upon the stand for they have a large share of that variety which Max O'Rell attributes to every American citizen when he says "that in America every fellow wishes every other fellow to think that he is a devil of a fellow," and this fondness for display and love of approbation will often cause them to get into very deep

water ; but in order that the advocate may accomplish his purpose he must conceal the object he has in view and remain master of himself, no matter how trying his situation may prove. He must then when he has led the witness to make statements which are improbable and unreasonable, ask him to explain his glaring inaccuracies and if he attempts to equivocate or give evasive answers sternly hold him to the issues involved. In this way many experts are completely broken down and their testimony is rendered worthless to the side for which they are called. But it often happens that so called experts are mere shams and pretenders and utterly unqualified to express an opinion upon the subject under investigation. When this is the case it is often wise not to object to the witness testifying as an expert upon the ground of incompetency if he should happen to be technically qualified, for jurors often being self made men, are sometimes sensitive upon this point. Many of them think that a practical knowledge of things can be acquired by experience better than by a thorough course of instruction in the best institution of learning ; consequently, with this in mind the advocate would do well to allow the witness to stand upon his merits, and by a searching examination prove that he does not know so much as he thinks he does about the questions involved. But if the testimony of an expert witness is not to be shaken it is better to examine him upon a few unimportant matters to show the jury you are not afraid to question him and then dismiss him." Morrison on Advocacy Pp. 108—111.

#### Silent Cross-Examination

In a complaint by B, against C, for causing a nuisance by smoke from his mill, which only worked from 9 a. m. to 6 p. m., A is called as a witness to prove that he was annoyed as one of the public from the smoke of the mill, and in cross-examination he is asked : have you any employment ? A Yes, I work in an office. Q. What are your office hours ? A. I go to office every day at 8 and return at 7. A. Now please confine yourself to my question. Have you personally been injuriously affected by the smoke of the mill A. No, I was away all day—but—Counsel : " That will do That is a complete answer to my question." He was going to add " but my aunt who was in the house all used to complain to me of it " which would have been disastrous for though hearsay evidence, it might carry its impression." From Morrison on Advocacy Pp. 130-131.

#### Forgery of Handwriting Traced and Free-hand.

One tracing method consists of placing sufficiently transparent paper over the signature or writing of which a facsimile is desired and then tracing the lines of writing with a pencil or pen. If required in ink and done first with a pencil, the lines are subsequently inked over. A second method is by placing the writing to be forged upon a transparency, such as a pane of glass against a strong light and then superimposing another piece of paper and tracing thereon the writing underneath. Another method is by first tracing the signature or writing upon tracing or other suitable paper and then turning the latter over and blackening it with lead pencil. The prepared tracing is then placed in position on the paper or document on which the forged signature or writing is to be affixed with the black side down and the first tracing gone over again ; the copy or impression on the document is then inked over with pen and the forgery accomplished. "*Identification of Handwriting and Detection of Forgery*" by Charles Hardless, Ed. 1914, p. 83. A free-hand forgery requires some degree of skill, the forger previously



making a study and practice of the signature of writing to be forged until he has attained to some degree of excellence in its imitation so as to render it offhand. Traced forgeries almost invariably fail in movement, pen-presentation, pen-pressure and execution or speed. They consequently afford means of detection in various ways. Firstly, there are the formal, slow, nervous lines in the writing, the forming of which is the natural result of the tracing process. Secondly, there is even flow of the ink made by the slow and evenly drawn lines. Thirdly, the absence of natural shading caused by the slow drawing of the pen with regular even pressure. Sometimes attempt is made to rectify this and then there are the evidences of touching, retouching done in order to increase similitude. In some instances even 'pen-painting' is resorted to in order to emphasise the shading and so render it like the original. Fourthly, there are frequently evidences of abnormal pressure at various parts caused by the forger stopping to see whether he is guiding his pen correctly over the lines, and while doing so keeping his pen upon and pressing on the paper, or it may be that instead of pen-pauses there are pen-lifts (in many cases both) caused by the writer for the same object, frequently raising his pen off the paper. The abnormal pressure caused by pen-pauses or breaks due to the pen-lifts is sometimes observed in unlikely places such as in the course of a continuous up or down stroke or curve, where there should be no stoppage or break. Traced forgeries are more common in the case of signatures than letters. Free-hand forgeries are usually employed in cases of imitated script such as forgeries of signatures, letters, pro notes and receipts, tampering with bills, alterations, additions and interlineations, raised and forged cheques, altered figures, over-writings, erasures and suspicious dates. For the detection of the handwriting in such cases, the methods of comparison by characteristics should be observed, and the movement, pen-scope, pen-presentation, pen-pressure, direction, execution, alignment, arrangement, comparative sizing and makes of the curves and angles tested in the cases of the questioned signatures or writings, of the writings of the person whose handwriting is alleged to be forged or simulated, as well as the handwriting of the person or persons suspected or committing the forgery. Another common defect in free-hand forger's signatures is the unusual number of breaks or divisions of the letters or characters in words. Free-hand forgeries and even traced forgeries frequently show signs of tremor, that is deviation from the uniformity of the strokes and lines of writing. *Ibid* p 85 to 104.

#### Illustrations on Cross-examination of Handwriting Experts

(i) In connection with the Osborne Cadet Case, Sir Edward Carson made a powerful attack upon the testimony of experts in handwriting going to the length of suggesting that it should never be admitted. It is easy, of course, to ridicule the pretensions and achievements of some of these witnesses, and Sir Edward Carson is not the only distinguished member of the Bar who has revelled in the task. Here, for instance, is Lord Brampton's account, in his "Reminiscences" of an encounter he once had with Mr. Nethercliffe, the most famous of all the experts in handwriting of his time. When I rose to cross-examine, I handed to the expert six slips of papers, each of which was written in a different kind of handwriting. Nethercliffe took out his large pair of spectacles, magnifiers, which he always carried. Then he began to polish them with a great deal of care, saying, as he performed the operation: "I see, Mr. Hawkins, what you are going to try to do. You want to put me in a hole." "I do, Mr. Nethercliffe; and if you are ready for the hole, tell me, whether these six pieces of paper were written

by one hand about the same time ? ”

“ He examined them carefully, and after a considerable time answered :  
“ No They were written at different times and by different hands.”

“ By different persons; do you say ? ” “ Yes certainly.”

“ Now, Mr. Nethercliffe, you are in the hole ! I wrote them myself this morning at this desk.”

To challenge the infallibility of the evidence of experts in handwriting is one thing, to propose, as Sir Edward Carson does, to exclude it altogether is quite another. There are cases in which the trained observation of the expert may be of assistance to the Judge and jury, and there would be little wisdom making it a hard and fast rule that their evidence shall not be admissible. What is required is a change in the status of these witnesses. Their statements should be regarded as advice rather than evidence and no Judge or jury should accept their statements without exercising an independent opinion. This is already the practice of nearly all our Judges and Magistrates, but there have been occasions in recent years on which the practice has not been followed as closely as it might have been. The Law Journal cited in 20 M. L. (Jr.) 372

(ii) The following example of the cross-examination of an expert in handwriting who had sworn to a forged document as being in the handwriting of the prisoner, may be given to illustrate the prejudice.

“ What would you say,” asked the counsel for the defence. “ If the man who actually signed that document came into the box and swore it ? ”

“ I would not believe him,” emphatically protested the expert who never could hear his opinion to be doubted.

“ What would you say if witness came up and swore he saw him write it ? ”

“ It should say the same if a hundred witnesses came forward,” answered the irritated and irritable old gentleman, almost beside himself with rage. “ The peculiarities are so strong, Sir there is no mistaking them.”

“ What would you say, Sir..... ? ” began once more the counsel.

“ What would I say ? What is the use of asking me what I would..... ? ”

“ If you had seen him write it yourself ? ” adroitly slipped in the counsel. “ I would not believe.....”

“ Your own eyes,” laughed the counsel, and amidst a roar of laughter the old man gesticulated violently with his head and first and was told to stand down Harris' Illustrations in Advocacy, p. 106.

(iii) In the Caldwell Forgeries Case, Recorder Vaux, who was called to the witness-stand as an expert in handwriting, in his direct testimony had very clearly identified the prisoner with the commission of the particular forgery for which he was on trial. He was then turned over to Mr. Emmet, counsel for the defence, for cross-examination.

Q. (Taking a letter from among his papers and handing it to the witness, after turning down the signature). “ Would you be good enough to tell me, Mr. Vaux, who was the author of the letter which I now hand you ? ”

A. (Answering promptly). "This letter is in the handwriting of 'Munroe Edwards' the prisoner on trial for forgery).

Q. "Do you feel certain of that, Mr. Vaux?" A. "I do".

Q. "As certain as you are in relation to the handwriting of these letters which you have previously identified as having been written by the prisoner?" A. "Exactly the same."

Q. "You have no hesitation then in swearing positively that the letter you hold in your hand, in your opinion, was written by Munroe Edwards?" "Not the slightest."

Q. "That will do, sir."

*Counsel for the prosecution.* "Let me see the letter."

*Counsel for the defence.* "That is your privilege, Sir, but I doubt if it will be to your profit. The letter is directed to myself and is written by the cashier of Orleans Bank, informing me of a sum of money deposited in this institution to the credit of the prisoner. Mr. Vaux's evidence in relation to it will test the value of his testimony in relation to other equally important points."

Here Mr. Vaux walked to the table of the prosecution, re-examined the letter carefully, then reached to a tin box which was in the keeping of the prosecution and contained New Orleans post-office stamps. He then resumed his seat in witness-chair.

*Counsel for prosecution in re-examination,* "You have just testified, Mr. Vaux, that you believe the letter which you hold in your hand was written by the same hand that wrote the Caldwell forgeries, and that such hand was Munroe Edwards'. Do you still retain that opinion?"

*Witness.* "I do."

*Counsel.* "Upon what grounds?"

*Witness.* "Because it is a fellow of the same character as well in appearance as in device. It is a forgery probably only intended to impose upon his counsel, but now by its unadvised introduction in evidence, made to impose upon himself and brand him as a forger."

(iv) One Elison was tried for felonious assault upon Henriques who peremptorily directed that the said Elison should cease paying his attentions to his daughter. Mrs. Naome. The authenticity of certain compromising letters alleged to have been written by the lady to Elison was brought in question. Mrs. Naome denied having ever written those letters. Professor Ames, a well-known expert in handwriting, was called in to depose about the identity of the handwriting. He deposed to having closely studied the letter in question, in conjunction with an admittedly genuine specimen of the lady's handwriting, and gave it as his opinion that they were all written by the same hand. The following is a portion of the cross-examination of the expert counsel:—

*Counsel.* "Mr. Ames, as I understood you, you were given only one sample of the lady's genuine handwriting, and you base your opinion upon the single exhibit, is that correct?"

*Witness.* "Yes, sir, there was only one letter given to me, but that was quite a long one, and afforded me great opportunity for comparison."

*Counsel.* "Would it not assist you if you were given a number of letters with which to make a comparison?"

*Witness*. "Oh yes, the more samples I had of genuine handwriting, the more valuable my conclusion would become."

*Counsel* (taking from among a bundle of papers a letter, folding down the signature and handing it to the witness). "Would you mind taking this one and comparing it with the others and then tell us if that is the same handwriting?"

*Witness* (examining the paper closely for a few minutes). "Yes, sir, I should say that was the same handwriting."

*Counsel*. "It is not a fact, sir, that the same individual may write a variety of hands upon different occasions and with different pens?"

*Witness*. "Oh yes sir; they might vary somewhat."

*Counsel* (taking a second letter from his files, also folding over the signature and handing it to the witness). "Won't you kindly take this letter also, and compare it with the others you have?"

*Witness* (examining the letter). "Yes, sir, that is a variety of the same penmanship."

*Counsel*. "Would you be willing to give it as your opinion that it was written by the same person?"

*Witness*. "I certainly would, sir."

*Counsel* (taking a third letter from his files, again folding over the signature, and handing to the witness). "Be good enough to take just one more sample—I don't want to weary you—and say if this last one is also in the lady's handwriting."

*Witness* (appearing to examine it closely, leaving the witness-chair and going to the window to complete his inspection). "Yes, sir. You understand I am not swearing to a fact, only to an opinion."

*Counsel* (good-naturedly). "Of course I understand; but is it your honest opinion as an expert that these three letters are all in the same handwriting?"

*Witness*. "I say yes, it is my honest opinion."

*Counsel*. "Now, sir, won't you please turn down the edge where I folded over the signature to the first letter I handed you, and read aloud to the jury the signature?"

*Witness* (unfolding the letter and reading triumphantly). "Lila Naome."

*Counsel*. "Please unfold the second letter and read the signature."

*Witness* (reading). "William Henriques."

*Counsel*. "Now the third, please."

*Witness* (hesitating and reading with much embarrassment). "Frank Ellison."

After this cross-examination of the expert, the alleged compromising letters were never read to the jury. See Wellman. pp. 87—93.

(v) Probably one of the most dramatic and successful of the more celebrated cross-examination in the history of the English Courts is Russell's cross-examination of Pigott, the chief witness in the investigation grow out of the attack upon Charles S. Parnell, and 65 Irish members of Parliament, by name, for belonging to a lawless and even murderous organization, whose aim was the overthrow of English rule,

The principal charge against Parnell, and the only one that interests us in the cross-examination of the witness Pigott, was the writing of a letter by Parnell which the *Times* claimed to have obtained and published in facsimile, in which he excused the murderer of Lord Frederick Cavendish, Chief Secretary for Ireland, and of Mr. Burke, Under Secretary, in Phoenix Park, Dublin, on May 6th, 1882. One particular sentence in the letter read, "I cannot refuse to admit that Burke got no more than his deserts."

The publication of this letter naturally made a great stir in Parliament and in the country at large. Parnell stated in the House of Commons that the letter was a forgery, and asked for the appointment of a select committee to enquire whether the facsimile letter was a forgery. The Government refused his request, but appointed a special committee, composed of three Judges, to investigate all the charges made by the *Times*.

The writer is indebted to Russell's biographer Mr. O'Brien, for the details of this celebrated case. Seldom has any legal controversy been so graphically described as this one. One seems to be living with Russell, and indeed with Mr. O'Brien himself throughout those eventful months. We must content ourselves, however, with a reproduction of the cross-examination of Pigott as it comes from the stenographer's minutes of the trial, enlightened by the pen of Russell's facile biographer.

Mr. O'Brien speaks of it as "the event in the life of Russell—the defence of Parnell." In order to undertake the defence, Russell, returned to the *Times* the retainer he had enjoyed from them for many previous years. It was known that the *Times* had bought the letter from Mr. Houston, the Secretary of the Irish Loyal and Patriotic Union, and that Mr. Houston had bought it from Pigott. But how did Pigott come by it? That was the question of the hour, and people looked forward to the day when Pigott should go into the box to tell his story, and when Sir Charles Russell should rise to cross-examine him. Mr. O'Brien writes: "Pigott's evidence-in-chief so far as the letter was concerned, came practically to this: he has been employed by the Irish Loyal and Patriotic Union to hunt up documents which might incriminate Parnell, and he had bought the facsimile letter with other letters, in Paris from an agent of the Clanna Gael, who had no objection to injuring Parnell for a valuable consideration. During the whole week or more Russell had looked pale, worn, anxious, nervous, distressed. He was impatient, irritable, at times disagreeable. Even at luncheon, half-an-hour before, he seemed to be thoroughly out of sorts and gave you the idea rather of a young junior with his first brief than of the most formidable advocate at the Bar. Now all was changed, as he stood facing Pigott; he was picture of calmness, self-possession, strength, there was no sign of impatience or irritability; not a trace of illness, anxiety, or care; a slight tinge of colour lighted up the face, the eyes sparkled and a pleasant smile played about the mouth. The whole bearing and manner of the man, as he proudly turned his head towards the box, showed courage resolution and confidence addressing the witness with much courtesy, while a profound silence fell upon the crowded Court, he began:—

Q. "Mr. Pigott, would you be good enough with my Lord's permission, to write some words on that sheet of paper for me? Perhaps you will sit down in order to do so?"

A sheet of paper was then handed to the witness. I thought he looked for a moment surprised. This clearly was not the beginning that he had expected. He hesitated, seemed confused. Perhaps Russell observed it. At all

events he added quickly : " Would you like to sit down ? "

" Oh, no, thanks ' replied Pigott, a little flurried.

Pigott sat down and seemed to recover his equilibrium.

*Russell*.—Will you write the word " livelihood ? " Pigott wrote.

*Russell*.—Just leave a space. Will you write the word " likelihood ? "

Pigott wrote.

*Russell*.—Will you write your own name ? Will you write the word " proselytism," and finally, (I think I will not trouble you at present with any more) " Pattrick Egan " and " P. Egan ? " He uttered these last words with emphasis, as if they imported something of great importance.

Then when Pigott had written, he added carelessly, " There is one word I had forgotton. Lower down, please, leaving space, write the word ' hesitancy.' " Then as Pigott was about to write, he added, as if this were the vital point, " With a small 'h' ". Pigot wrote and looked relieved.

*Russell*.—Will you kindly give me the sheet ?

Pigott took up a bit of blotting paper to lay on the sheet, when Russell with a sharp ring in his voice, said rapidly : " Don't blot it please " It seemed to me that the sharp ring in Russell's voice startled Pigott. While writing he had looked composed : now again he looked flurried, and nervously handed back the sheet. The Attorney General looked keenly at it and then said, with the air of a man who had himself scored, " My Lords, I suggest that had better be photographed, if your Lordships see no objection."

Russell (turning sharply toward the Attorney-General, and with an angry glance and an Ulster accent, which sometimes broke out when he felt irritated). " Do not interrupt my cross-examination with that request."

Little did the Attorney-General at that moment know that in the ten minutes or quarter of an hour which it had taken to ask these questions, Russell had gained a decisive advantage. Pigott had in one of his letters to Pat Egan spelt " hesitancy," thus, " hesitency." In one of the incriminatory letters " hesitercy " was so spelt ; and in the sheet now handed back to Russell, Pigott had written " hesitency," too. In fact it was Pigott's spelling of this word that had put the Irish members on his scent. Pat Egan, seeing the word spelt with an " e " in one of incriminatory letters, had written to Parnell saying in effect, " Pigott is the forger." In the letter ascribed to you " hesitancy " is spelt " hesitency." These things were not dreamt of in the philosophy of the Attorney-General when he interrupted Russell's cross-examination with the request that the " sheet had better be photographed." So closed the first round of the combat.

Russell went on in his former courteous manner, and Pigott, who had now completely recovered confidence, looked once more like a man determined to stand to his guns. Russell, having disposed of some preliminary points at length (and after perhaps he has been some half-an-hour on his feet), closed with the witness.

*Russell*.—The first publication of the articles " Parnellism and Crime " was on the 7th March, 1887.

*Pigott*.—(Surlily) " I do not know."

*Russell*.—(Amiably). " Well, you may assume that is the date."

*Pigott*.—(Carelessly). " I suppose so."

*Russell.*—"And you were aware of the intended publication of the correspondence, the incriminatory letters?"

*Pigott.*—(Firmly). "No, I was not at all aware of it."

*Russell.*—(Sharply, and with the Ulster ring in his voice). "What?"

*Pigott.*—(Boldly). "No certainly not."

*Russell.*—"Were you not aware that there were grave charges to be made against Mr. Parnell and the leading members of the Land League?"

*Pigott.*—(Positively). "I was not aware of it until they actually commenced."

*Russell.*—(Again with the Ulster ring). "What?"

*Pigott.*—(Defiantly). "I was not aware of it until the publication actually commenced."

*Russell.*—(Pausing, and looking straight at the witness). "Do you swear that?" *Pigott.*—(Aggressively). "I do."

*Russell.*—(Making a gesture with both hands and looking the bench). "Very good there is no mistake about that."

Then there was a pause; Russell placed his hands beneath the shelf in front of him, and drew from it some papers—Pigott, the Attorney-General, the Judges, every one in Court looking intently, at him the while. There was not a breath, not a movement. I think it was the most dramatic scene in the whole cross-examination abounding as it did in dramatic scenes. Then, handing Pigott a letter, Russell said calmly: "Is that your letter? Do not trouble to read it; tell me if it is your letter."

Pigott took the letter, and held it close to his eyes as if reading it.

*Russell.*—(Sharply). "Do not trouble to read it."

*Pigott.*—"Yes, I think it is."

*Russell.*—(With a frown). "Have you any doubt of it?"

*Pigott.*—"No."

*Russell.*—(Addressing the Judges) "My Lords, it is from Anderton's Hotel, and it is addressed by the witness to Archbishop Walsh. The date, My Lords, is the 4th of March, three days before the first appearance of the first of the articles, 'Parnellism and Crime.'"

He then read: "Private and confidential." "My Lord; The importance of the matter about which I write will doubtless, excuse intrusion on your Grace's attention Briefly I wish to say that I have been made aware of the details of certain proceedings that are in preparation with the object of destroying the influence of the Parnellite party in Parliament." Having read this much Russell turned to Pigott and said:—"What were the certain proceedings that were in preparation?"

*Pigott.*—"I do not recollect."

*Russell.*—(Resolutely). "Turn to my Lords and repeat the answer."

*Pigott.*—"I do not recollect."

*Russell.*—"You swear that writing on the 4th of March, less than two years ago?" *Pigott.*—"Yes."

*Russell.*—"You do not know what that referred to?"

*Pigott.*—"I do not really."

Russell.—“ May I suggest to you ? ” Pigott.—“ Yes, you may.”

Russell.—“ Did it refer to the incriminatory letters among other things ? ”

Pigott.—“ Oh at that date ? No, the letters had not been obtained, I think at that date, had they, two years ago ? ”

Russell.—(Quickly and courteously). “ I do not want to confuse you at all Mr. Pigott.”

Pigott.—“ Would you mind giving me the date of that letter ? ”

Russell.—“ The 4th of March.” Pigott.—“ The 4th of March ? ”

Russell.—“ It is your impression that the letter had not been obtained at that date ? ”

Pigott.—“ Oh yes, some of the letters had been obtained before that date.”

Russell.—“ Then reminding you that some of the letters had been obtained before that date, did that passage that I have read to you in that letter refer to these letters among other things ? ”

Pigott.—“ No, I rather fancy they had reference to the forthcoming articles in the *Times*.”

Russell.—(Glancing keenly at the witness). “ I thought you told us you did not know anything about the forthcoming articles ? ”

Pigott.—(Looking confused). “ Yes, I did. I find now I am mistaken, that I must have heard something about them.”

Russell.—(Severely). “ Then try not to make the same mistake again, Mr. Pigott. Now, you go on ” (continuing to read from Pigott’s letter to the Archbishop). “ I cannot enter more fully into details than to state that the proceedings referred to consist in the publication of certain statements purporting to prove the complicity of Mr. Parnell himself, and some of his supporters, with murders and outrages in Ireland to be followed in all probability, by the institution of criminal proceedings against these parties by the Government.”

Having finished the reading, Russell, laid down the letter and said.

Q. “ Who told you that ? ” A. “ I have no idea ”.

Q. (Striking the paper energetically with his fingers). “ But that refers, among other things to the incriminatory letters.”

A. “ I do not recollect that it did.”

Q. (With energy), “ Do you swear that it did not ? ”

A. “ I will not swear that it did not.”

Q. “ Do you think it did ? ” A. “ No, I do not think it did.”

Q. “ Do you think that these letters, if genuine, would prove or would not prove, Parnell’s complicity in the crime ? ”

A. “ I thought they would be very likely to prove it.”

Q. “ Now reminding you of that opinion I ask you whether you did not intend to refer—not solely, I suggest, but among other things—to the letters as being the matter which would prove complicity or purport to prove complicity ? ” A. “ Yes, I may have had that in mind.”

Q. “ You could have hardly any doubt that you had ? ”

A. “ I suppose so.”

Q. “ You suppose you may have had ? ” A. “ Yes.”

Q. “ There is the letter and the statement (reading), ‘ Your Grace may be assured that I speak with full knowledge, and am in a position



to prove beyond all doubt and question the truth of what I say.' Was that true?" A. "I could hardly be true."

Q. "Then did you write that which was false?"

A. "I suppose it was in order to give strength to what I said. I do not think it was warranted by what I knew."

Q. "You added the untrue statement in order to add strength to what you said?" A. 'Yes'.

Q. 'You believe these letters to be genuine?' A. 'I do.'

Q. 'And did at this time?' A. 'Yes.'

Q. (Reading). "And I will further assure your Grace that I am also able to point out how these designs may be successfully combated and finally defeated." How it these documents were genuine documents, and you believed them to be such, how were you able to assure his Grace that you were able to point out how the design might be successfully combated and finally defeated?"

A. 'Well, as I say, I had not the letters actually in my mind at that time, so far as I can gather, I do not recollect the letter to Archbishop Walsh at all. My memory is really a blank on the circumstances.'

Q. 'You told me a moment ago, after great deliberation and consideration, you had both the incriminatory letters and the letter to Archbishop Walsh in your mind.'

A. 'I said it was probable I did, but I say the thing has completely faded out of mind.'

Q. (Resolutely). 'I must press you. Assuming the letters to be genuine what were the means by which you were able to assure his Grace that you could point out how the design might be successfully combated and finally defeated?'

A. (Helplessly). 'I cannot conceive really.'

Q. 'Oh, try. You must really try.' A. 'I cannot.'

Q. 'Try.' A. 'It is no use.'

Q. 'May I take it, then your answer to my Lords is that you cannot give any explanation?'

A. 'I really cannot absolutely.'

Q. (Reading). "I assure your Grace that I have no other motive except to respectfully suggest that your Grace would communicate the substance to some one or other of the parties concerned, to whom I could furnish details, exhibit proofs, and suggest how the coming blow may be effectually met." What do you say to that, Mr. Pigott?"

A. 'I have nothing to say except that I do not recollect anything about it absolutely.'

Q. 'What was the coming blow?'

A. 'I suppose the coming publication.'

Q. 'How was it to be effectively met?'

A. 'I have not the slightest idea.'

Q. 'Assuming the letters to be genuine, does it not even now occur to your mind how it could be effectively met?' A. 'No.'

Pigott now looked like a man after the sixth round in a prize fight, who had been knocked down in every round. But Russell showed him no mercy. I shall take another extract.

\*

Q. 'Whatever the charges in "Parnellism and Crime," including the letters were, did you believe them to be true or not?'

A. 'How can I say that when I say I do not know what the charges were? I say I do not recollect that letter to the Archbishop at all, or any of the circumstances it refers to.'

Q. 'First of all you knew this that you procured and paid for a number of letters?' A. 'Yes.'

Q. 'Which if genuine, you have already told me, would gravely implicate the parties from whom these were supposed to come?' A. 'Yes, gravely implicate.'

Q. 'You would regard that, I suppose, as a serious charge?'

A. 'Yes.'

Q. 'Did you believe that charge to be true or false?'

A. 'I believed that charge to be true?'

Q. 'You believed that to be true?' A. 'I do.'

Q. 'Now I will read this passage [from Pigott's letter to the Archbishop], "I need hardly add that, did I consider the parties really guilty of the things charged against them, I should not dream of suggesting that your Grace should take part in an effort to shield them; I only wish to impress on your Grace that the evidence is apparently convincing, and would probably be sufficient to secure conviction if submitted to an English jury." What do you say to that, Mr. Pigott?'

A. 'I say nothing except that I am sure, I could not have had the letters in my mind when I said that, because I do not think the letters conveyed a sufficiently serious charge to cause me to write in that way.'

Q. 'But you know that was the only part of the charge, so far as you have yet told us, that you had anything to do in getting up?'

A. 'Yes that is, what I say; I must have had something else in my mind which I cannot at present recollect—that I must have had other charges.'

Q. 'What charges?' A. 'I do not know. That is what I cannot tell you.'

Q. 'Well let me remind you that that particular part of the charge—the incriminatory letters—were letters that you yourself knew all about?' A. 'Yes, of course.'

Q. (Reading from another letter of Pigott to the Archbishop) "I was somewhat disappointed in not having a line from your Grace, as I ventured to expect I might have been so far honoured. I can assure your Grace that I have no other motive in writing save to avert, if possible a great danger to people with whom your Grace is known to be in strong sympathy. At the same time, should your Grace not desire to interfere in the matter, or should you consider that they would refuse me a hearing, I will be contented having acquitted myself of what I conceived to be my duty in the circumstances. I will not further trouble your Grace save to again beg, that you

will not allow my name to transpire, seeing that to do so would interfere injuriously with my prospects, without any compensating advantage to any one. I make the request all the more confidently, because I have had no part in what is being done to the prejudice of the Parnellite party though I was enabled to become acquainted with all the details.'

A. (With a look of confusion and alarm). 'Yes.'

Q. 'What do you say to that?'

A. 'That it appears to me clearly that I had not the letters in mind.'

Q. 'Then if it appears to you clearly that you had not the letters in your mind, what had you in your mind?'

A. 'It must have been something far more serious.'

Q. 'What was it?'

A. (Helplessly, great beads of perspiration standing out on his forehead and tricking down his face.) 'I cannot tell you. I have no idea.'

Q. 'It must have been something far more serious than the letter?'

A. (Vacantly). 'Far more serious.'

Q. (Briskly). 'Can you give my Lords any clue of the most indirect kind to what it was?' A. (In despair). 'I cannot.'

Q. 'Or from whom you heard it?' A. 'No.'

Q. 'Or when you heard it?' A. 'Or when I heard it.'

Q. 'Or where you heard it?' A. 'Or where I heard it.'

Q. 'Have you ever mentioned this fearful matter—whatever it is—to anybody?' A. 'No.'

Q. 'Still locked up, hermetically sealed in your own bosom?'

A. 'No, because it has gone away out of my bosom, whatever it was.'

On receiving this answer Russell smiled, looked at the bench, and sat down. A ripple of derisive laughter broke over the Court, and a buzz of many voices followed. The people standing around looked at each other and said, "splendid." The judges rose, the great crowd melted away, and an Irishman who mingled in the throng expressed, I think, the general sentiment in a single word, 'Smashed!' Pigott's cross-examination was finished the following day, and the second day he disappeared entirely, and later sent back from Paris a confession of his guilt, admitting his perjury, and giving the details of how he had forged the alleged Parnell letter by tracing words and phrases from genuine Parnell letters, placed against the windowpane, and admitting that he had sold the forged letter for £605. After the confession was read, the Commission "found" that it was a forgery, and the *Times* withdrew the facsimile letter. A warrant was issued for Pigott's arrest on the charge of perjury, but when he was tracked by the police to a hotel in Madrid, he asked to be given time enough to collect his belongings, and retiring to his room, blew out his brains.

### Identification of Handwriting by Layman.

S. 47, Evidence Act, lays down that, "When the Court has to form an opinion as to the person by whom any document was written or signed the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, that it was or was not written or signed by that person, is a relevant fact.

*Explanation.*—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

*Illustration.* The question is, whether a given letter is in the handwriting of A, a merchant in London. B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon. The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

There are various ways of proving the handwriting of a person. Besides the expert, persons who are acquainted with the handwriting can also prove it. The following decisions will prove useful in this connection:—The writing, with which the disputed writing is to be compared must, if not admitted, be proved to be genuine, and the comparison must be made in open Court. 53 C 372; 1926 C. 139, 39 C 606, 37 C. 467, 36 M. 159, *but see* 30 I. C. 751. A document may be proved under S. 47, Ev. Act, by the evidence of the person acquainted with the handwriting of the alleged writer. 1932 B. 588; 141 I. C. 747, 4 P. 394; 1925 P. 787, 53 C. 372. 18 P. R. 1915, 15 I. C. 979, 36 M. 159. A document may be proved under S. 73, Ev. Act, by comparing in Court the disputed writing with some other writing admitted or proved to be genuine. 1932 B. 588; 141 I. C. 747, 53 C. 372, 37 C. 467. But this mode has been disapproved by experienced Judges as hazardous and inconclusive. 1925 C. 485; 78 I. C. 668, 1935 O. 41; 152 I. C. 1042, 1925 C. 145, 39 C. 606, 64 I. C. 234, 1923 L. 695, 49 C. 235, 37 C. 467. The practice of Court acting as expert and declaring a document forgery has been deprecated, 1924 P. 284, 37 C. 467, particularly when there is no evidence or allegation of forgery. 1925 C. 485; 78 I. C. 668. A document does not prove itself: nor is an unproved signature on it proof of its having been written by the person whose signature it purports to bear. 49 C. 235. If a document is signed or written by any person the signature or writing must be proved to be in that person's handwriting. Any mode of proof recognised by the Act, may be considered sufficient. 1934 M. 365, 1930 M. 770, 1922 N. 227, 37 C. 467. 11 B. 690, 46 I. C. 279.

The modes of proving a signature or writing recognised by the Act are as follows:—(a) By calling the person who signed or wrote the document. 1925 L. 299; 88 I. C. 22, 49 C. 235, 37 C. 467. (b) By calling a person in whose presence the document was signed or written. 1925 L. 299; 88 I. C. 22, 49 C. 235, 37 C. 467, 42 A. 262, 66 I. C. 774, 16 I. C. 257. (c) By

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calling a handwriting expert under S. 45. Ev. Act. 1932 B. 588, 53 C. 372. (d) By calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written. S. 47 Ev. Act. 1932 B. 588, 53 C. 372, 1925 L. 299, 49 C. 235, 37 C. 467. (e) By comparing in Court the disputed signature or writing with some admitted signature or writing. S. 73, Ev. Act. 1932 B. 588, 53 C. 372, 1925 L. 299, 49 C. 235, 42 A. 262, 16 I. C. 257, 37 C. 467. (f) By proof of an admission by the person who is alleged to have signed or written the document that he signed or wrote it. 1928 C. 498; 111 I. C. 792, 49 C. 235, 37 C. 467. (g) By statement of a deceased professional scribe made in the ordinary course of business, that the signature on the document is that of a particular person. 1922 N. 227; 77 I. C. 798. 11 B. 690, 27 I. C. 866, *see* 1930 M. 770. (h) By person who signed the the document at the request of the executant on behalf of the executant. 24 A. 319, 1931 A. 101; 53 A. 1.

S. 47, Ev. Act, makes relevant the opinion of a person who is acquainted with the handwriting of the 'alleged writer. 53 C. 372; 1926 C. 139, 1925 P. 787; 4 P. 394, 18 P. R. 1915, 147 P. L. R. 1913, 28 B. 588, 22 C. 313, even though he is not an expert. 1927 L. 724, 18 P. R. 1915.

The onus is on the party calling the witness to show that the witness is acquainted with the handwriting of the alleged writer. 1934 N. 204, 4 P. 394, 15 I. C. 979, 36 M. 159, *see* 1923 L. 695; 77 I. C. 872. If a witness states in examination-in-chief that he is acquainted with the handwriting, his evidence will be admissible though he has not been questioned as to the means of his knowledge, unless he is proved incompetent in cross-examination. 28 B. 588. A person is said to be acquainted with a person's handwriting when he has seen that person write at any time. The frequency and recentness of occasion will affect the value and not the admissibility of his evidence. Woodroffe, Ev., 9th Ed., p. 460. It is not impossible for a person, unable to read and write certain characters, to know and recognize and prove the handwriting of another in those particular characters, if he had the occasion to see the latter write. 1934 A. 990. The opinion of record-keeper, who in the course of his official duty, has to examine and file papers sent to him is relevant to prove the handwriting of a person whose papers are so filed though the number of such papers may not be great. 1925 B. 429 89 I. C. 1042.

The word "handwriting" includes writing and signatures or mark. 57 M. 662, 1934 A. 390. A seal or mark may be recognized under S. 47. 18 B. 66 (74).

"Like other things, handwriting may be recognised. A person recognises a letter which he himself has written, or another person's letter which he has before seen. And then he does it from his previous impression of the very writing recognised. And not only the very same or identical writing but also a person's manner or style of writing may be recognised. Almost everybody's usual handwriting possesses a peculiarity in it, distinguishing it from other people's writing. The peculiarity may be extremely nice, and scarcely discernable, but still it is there, and capable of being detected. And not only the writer himself, as A, but another person B, accustomed to see it, may have in his mind an impression of the writer's usual writing and its peculiarity in other words, his manner or style of writing. And if a letter or other paper written by A is presented to B, who has not seen it before, to prove it to be in the handwriting of A, the impression which B has of A's usual writing, and its peculiar character may enable him, not to recognise

very same or identical writing, but to recognise the style of A's writing, and express his belief that it is the writing of A. In this case, it is comparison and judgment which enable B to give the evidence required. He compares the style of the writing in question with the impression he has before received into his mind A's style of writing and on that comparison he can come to the conclusion and belief that the writing in question is in the handwriting of A." See *Ram on Facts*, p. 52.

"Hours and hours have I spent in endeavours altogether fruitless, to trace the writer of the letter by a minute examination of the character and never did it strike me till this moment, that your father wrote it. In the style I discover him, in the scoring of the emphatical words—his never failing practice—in the formation of many of the letters, and that in the adieu! at the bottom so plainly, that I could hardly be more convinced had I seen him write it." See *Cowper's Works (Letters)*, Vol. V, p. 217 Ed. 1836.

A written document may be sufficiently identified by a witness to be laid before the jury, although the witness is unable to read. He would still have the size, colour, and general appearance of the paper, the colour of the ink, and the size and general characteristics or appearance of the writing to compare with his mental picture. For example, one might be allowed to testify to the identity of a paper written in Greek, Hebrew, Sanskrit, or Egyptian hieroglyphics, although unable to read a word of either language. See *Com. v. Meserve*, 154 Mass. 64: 27 N. E. Rep. 997, 998.

#### Illustration

On the trial of O'Coigly for high treason in 1798, a witness, Dutton in his examination-in-chief, proved that a paper found in O'Coigly's pocket book was in his handwriting. This evidence was in a singular manner strongly confirmed by the witness's answers to questions put to him in cross-examination:—*Examination-in-Chief*.

- Q. "Are you acquainted with Mr. O'Coigly, the prisoner at the bar?"  
 A. "I knew him at Dundalk, in the North of Ireland."  
 Q. "Are you acquainted with his handwriting?"  
 A. "I have seen him write a number of times."  
 Q. "So as to have acquired a knowledge of his manner of writing?"  
 A. "Yes."  
 Q. "Look at that paper and say whether, from your knowledge of his manner of writing, you believe that to be his handwriting?"  
 A. "I do believe it to be his writing."  
 Q. "Do you include in that the signature, as well as the whole body of the paper?"  
 A. "I believe it to be all the same handwriting, and Mr. O'Coigly's handwriting."

#### Cross-examination

Q. "You have sworn you saw Mr. O'Coigly write. Upon what occasion did you ever see him write?"

A. "On various occasions I have seen him write letters, and notes. I can relate a singular circumstance to you and the Courts. There was a poor man of the name of Coleman in the gaol of Dunda. This man had a



wife, and was in great distress. The man's wife used to come to my little shop for tea and bread, and what they wanted; she had no money, and, left her husband's watch in my possession for the good she wanted. Priest O'Coigly, I believe through an act of charity to the poor man, took upon him to have this watch raffled, to relieve the poor man; he took a piece of paper and put his own name, and after that about a dozen more and desired me to call upon these people, and they would give me a shilling apiece, he gave me his shilling and said he would collect more about the town."

Q. "Upon that occasion you saw him write?" A. "Yes."

(See Trial of O'Coigly, p. 235)

(u) On Horne Tookes' trial for high treason in 1794, Mr. Woodfalls evidence of the prisoners' handwriting was in a remarkable manner confirmed on the prisoner's own cross-examination of him:—

Q. "Is this the handwriting of Mr. Tooke?" (Showing a book to the witness).

A. "I believe this part (pointing it out) is; but I cannot swear it."

Q. "You are not asked to do that."

A. "I never saw this entry—I mean merely to say for my own sake, and that of the jury that I only swear, that, as far as resemblance of hands strikes me, this is Mr. Tookes' writing. I have seen him write but not so often as his writing has passed through my hand."

Q. "But, however, from writing that you have seen, you are able to form a judgment?"

A. "I cannot say I am able to form a decisive judgment, but I believe, from the resemblance of hands, it is writing."

#### *Cross-examination*

Q. "Are you sure you have seen me write?" A. "Yes."

Q. "How long ago?" A. "Some years ago. I believe, full 17; the period is a memorable one. I allude to the circumstance of an advertisement for the subscriptions for the widows, orphans, and aged parents of the Americans who lost their lives at the battle of Lexington."

Q. "That was in 1775, 19 years ago?" A. "You are perfectly right; it was 19 years ago. The reason why I instanced this case was, because it was a memorable one. You delivered to me, in my brothel counting-house, a copy of the advertisement upon which I think you wrote the words, 'For the London Packet and Morning Chronicle.' I don't know that I have ever seen you write but once."

Q. "The last time you saw me write was 19 years ago?"

A. "Yes."

For other illustrations. See Prem's Law and Methods of Police Investigation 1947 Ch. 36.

## CHAPTER 91

### Of Honest and Truthful but Mistaken Witness

If the witness is honest but on account of defective observation or holding strong opinion of the merits of the case, is somehow prejudiced, he should not be cross-examined severely. The approach should be in a gentle

manner and effort should be made to clear the impression which he has wrongly made. Some pre-possession of the witness as to personal identity leads to wrong identification. Our faculty of combination which unconsciously comes into play, may corroborate our preception so that we may be completely led into an error. If a person at a distance of say 220 yards sees a man first come out and then go into the house of A and knows that A lives alone in the house, he will suppose, if the man resembles A in his exterior aspect, that the man is indeed A and will maintain the fact, as if he had seen him distinctly. In such cases verification must always be made at the spot. *Criminal Investigation* by Dr Hans Gross, Ed. 1934, p. 185.

"The art of cross-examination is not limited to the detection of mistakes in a witness. Sometimes it happens that you have good reason to believe that he is not mistaken, but that he is lying, and when you are assured of this, but not otherwise, you may treat him as a liar and deal with him accordingly. Your object will be to prove him to be a liar out of his own mouth, and it will be permissible to resort to many a stratagem for the purpose of detection which may not be fairly used towards a witness whom you believe to be honest but mistaken. The question has often occurred to us whether it is more prudent to show to a witness that you suspect him, or to conceal your doubts of his honesty. Either course has its advantage. By displaying your doubts you incur the risk of setting him upon his guard, and leading him to be more positive in his assertions and more circumspect in his answers; but, on the other hand, a conscious liar is almost always a moral coward; when he sees that he is detected, he can rarely muster courage to do more than reiterate his assertion, he has not the presence of mind to carry out the story by ingenious invention of details, and a consistent narrative of the accidental circumstances connected with it. A cautious concealment of your suspicion possesses the advantage of enabling you to conduct him into a labyrinth before he is aware of your design, and so to expose his falsehood by self-contradiction and absurdities. "Just as when distant objects are seen mistily, our imaginations come into play, leading us to fancy that we see nothing completely and distinctly, so, when the images of memory become dim, our present imagination helps us to restore them by putting a new patch into the old garment. If only there is some relic even of the past preserved, a bare suggestion of the way in which it may have happened will often suffice to produce the conviction that it actually did happen in this way. The suggestions that naturally arise in our minds at such times will bear the stamp of our present modes of experience and habits of thought. Hence, in trying to reconstruct the remote past we are constantly in danger of importing our present selves into our past selves."

**Human Memory is Fallible.**—"I ought to say frankly that my experience has taught me that the memory of men, even of good and true men, as to matters in which they have been personal actors, is frequently most dangerous and misleading. I could recount many curious stories which have been told me by friends who have been writers of history and biography, of the contradictory statements they have received from the best men in regard to scenes in which they have been present." Wellman, p. 144.

Boswell, in his "Life of Dr. Johnson," has related the particulars of his first meeting with Dr. Johnson, whom he had been very long desirous of seeing and conversing with. At last they accidentally met at the house of a Mr. Davies.

Mr. Arthur Murphy, in his "Essays on the Life and Genius of Dr. Johnson," likewise gives a description of Boswell's first meeting with Johnson.

Concerning Mr. Murphy's account of the matter, Mr. Boswell says: "Mr. Murphy has given an account of my first meeting with Dr. Johnson considerably different from my own, and I am persuaded, without any consciousness of error, his memory at the end of nearly thirty years has undoubtedly deceived him, and he supposes himself to have been present at a scene which he has probably heard inaccurately described by others. In my own notes, taken on the very day in which I am confident I marked everything material that passed, no mention is made of this gentleman; and I am sure that I should not have omitted one so well-known in the literary world. It may easily be imagined that this, my first interview with Dr. Johnson, with all its circumstances, made a strong impression on my mind and would be registered with peculiar attention."

A writer in the *Quarterly Review*, speaking of this same occurrence, say:—"An erroneous account of Boswell's first introduction to Dr. Johnson was published by Arthur Murphy, who asserted that he witnessed it. Boswell's appeal in his own strong recollection of so memorable an occasion and to his narrative he entered in his *Journal* at the time show that Murphy's account was quite inaccurate, and that he was not present at the scene. This Murphy did not later venture to contradict. As Boswell suggested, he had doubtless heard the circumstances repeated till at the end of thirty years he had come to fancy that he was an actor in them. His good faith was unquestionable and that he should have been so deluded is a memorable example of the fallibility of testimony and of the extreme difficulty of arriving at the truth." Wellman, p. 144.

1. Where a witness cannot be mistaken, and must be guilty of wilful prejury if his story is false, his testimony should be accredited in preference to opposing testimony of a witness who may be mistaken. This rule often enables a Court to dispose of a question of fact by finding it against the testimony of a witness who may have erred in his recollection. 3 H. J. Cas. 132 148.

2. Judge Dean, speaking for the Supreme Court of Pennsylvania, said: "No one with opportunity for observation of judicial proceedings has failed to notice the lamentable infirmities of human recollection." And Chief Justice Gibson of the same Court said:—"Every day's experience must bring home to the conviction of all men the insecurity of reliance on mere recollection." "How frail and fallible is memory!" said Judge Lumpkin of Georgia. "Usually the impressions made on the memory resemble much more the traceless track of the arrow through the air, than the enduring hieroglyphics upon the pyramids and obelisks of ancient Egypt. Many memories are mere sieves. And I would sooner trust the smallest slip of paper for truth than the strongest and most relative memory ever bestowed on a mortal man. I once preferred a claim on behalf of one of the frontier settlers of middle Georgia for Revolutionary services rendered as a guide to the American army in its retreat before Cornwallis. He was a preacher of the Gospel, and one of the best men I ever knew, and so reported and esteemed among all his acquaintances; but it was pretty well ascertained that he was at the time several miles distant from the theatre of his fancied achievements."

"With most men," said Judge Nisbet of Georgia, "no faculty is more treacherous than memory." 8 Ga. pp. 516—519.

"In the testimony of witnesses of truth, there is calmness and simplicity, naturalness of manner, an unaffected readiness and copious-

ness of details as well in one part of the evidence as in another, and an evident disregard of either the facility or difficulty of vindication or detection." See Taylor, 8th Ed., S. 44, S. 52; Field, 8th Ed., pp, XXXIII, XXXIV.

"Every day of my life makes me feel more and more how seldom a fact is accurately stated; how almost invariably when a story has passed through the mind of a third person it becomes, so far as regards the impression it makes in further repetitions, little better than falsehood, and this too, though the narrator be the most truth seeking person in existence." See Hawthorne.

"If the witness is truthful the task of the cross-examiner is comparatively easy. A truthful witness has no secret purpose. If he has gone astray in any part of his evidence or mis-stated facts, it would be necessary on the part of the cross-examiner to ascertain the real cause of such deviation from the true facts. In the majority of cases it will be found that it is not only the easy conscience of the witness that accounts for such deviations, but there are other extraneous influences that have worked strongly upon his mind, perturbed his judgment, and rendered him incapable of seeing matters in their true light. It is not only mendacity that gives false colouring to facts, but human frailties equally account for distortion of the real facts in numerous instances. It should be the duty of the cross-examiner, therefore, to find out the real cause, and to bring out the facts tending to explain the true state of affairs, which a truthful witness will be induced to do easily. A witness of this character should not be treated in a manner that raises doubts as to his honesty or integrity. You have to prevail upon him to confess that which will wear the aspect of falsehood, which makes your task difficult. Now there is nothing more offensive to the feeling of a witness whatever may be his position in life than the dread of being made to appear to be lying. Upon such a juncture the witness at once becomes resolute to adhere to his original statement. It is, therefore, necessary on your part to deal with such a witness with extreme caution. You must wear an open brow, and assume a kindly tone. Let there be in your language no sound of suspicion. Intimate to him directly your confidence that he is desirous of telling the truth and the whole truth. See Rahmatullah, p. 103.

With such a witness of whose candour you are seeking to avail yourself, the better course is to begin with the beginning of the story he has told, and conduct him through it again in the same order, only introducing at the right places the questions which are intended to explain or qualify what he has stated in his examination-in-chief. You take him into his former track, you ever make him repeat a portion of what he has before said—you recall his mind to the subject with which it is familiar. The scene is again before him, occupying his thoughts. Then it is easy to try him upon the details (but still gently), to suggest whether it may not have differed by so and so from that which he has described, or if so and so (which gives the transaction another complexion) did not occur also, and thus at more or less length according to the circumstances of the case. In the same manner you may carry him to the conclusion of his story, and what with an explanation of one fact, and addition to another, and a toning down of the colour of the whole, the evidence will usually appear in a very different aspect after a judicious cross-examination, from that which it wore at the close of the examination-in-chief. If the witness is partially truthful and partially false,

much tact and ingenuity is required on your part in handling him. Your first duty would be to separate the true from the false facts, and to mark carefully those parts of his statement where false colouring has been given, or where additions and alterations have been made in order to suit the testimony for the party in whose favour it is offered. "You must watch carefully to find out if there be a want of assimilation in the parts of the story; if there be a disagreement between some of the false parts and some of the true, you must ascertain whether the alleged facts can exist together." See *Ibid*, p. 104.

When a witness is honest but mistaken, approach him with a smile and encourage him with a cheering word, assure him that you are satisfied that he intends to tell the truth and the whole truth, and having thus won his good-will and confidence; proceed slowly, quietly and in a tone as conversational as possible, to your object. Do not approach it too suddenly, or you will chance to frighten him with that which forms the greatest impediment to the discovery of the truth from a witness, the dread of appearing to contradict himself. If once this alarm be kindled it is extremely difficult to procure plain unequivocal answers. The witness forthwith places himself on the defensive, and, deeming you an enemy, fences you with more or less of skill, certainly, but always to the weakening of whatever may drop from him in your favour. With such a witness, of whose candour you are seeking to avail yourself the better course is to begin with the beginning of the story he has told, and conduct him through it again in the same order only introducing at the right places the questions which are intended to explain or qualify what he has stated in his examination-in-chief. The advantage of this course is the avoidance of any appearance of a surprise upon him. You take him in his former track, you even make him repeat a portion of what he has before said, you recall his mind to the subject with which it is familiar. The scene is again before him, occupying his thoughts. Then it is easy to try him upon the details (but still gently) to suggest whether it may not have differed by so-and-so from that which he has described, or if so-and-so (which gives the transaction another complexion) did not occur also, and thus at more or less length according to the circumstances of the case.

#### Illustrations.

(i) The following is the method of cross-examination which Rufus Choate is said to have adopted as a general rule. Except in occasional cases his cross-examinations were as short as his arguments were long. He treated every man who appeared like a fair and honest person on the stand, as if upon the presumption that he was a gentleman; and if a man appeared badly, he demolished him, but with the air of a surgeon performing a disagreeable amputation, as if he was profoundly sorry for the necessity. Few men, good or bad, ever cherished any resentment against Choate for his cross-examination of them. His whole style of address to the occupants of the witness-stand was soothing, kind and reassuring. When he came down heavily to crush a witness, it was with a calm, resolute decision, but no asperity.

(ii) The following brief review of the trial of Tucker for the murder of Miss Mable Page illustrates how witnesses, experts and laymen, are liable to commit honest mistakes in their depositions, and how they can be reconciled or explained without attributing perjury to any of the witnesses. While murder is always shocking, rarely has New England been more

startled than by the murder of Miss Mable Page. A highly respected woman, without an enemy in the world, was stricken down and stabbed again and again in her own home on a highway in a suburban village in the middle of the day by an assassin who came and went unseen. The Page family was well-known and respected in Boston and vicinity. Mr. Page, who at the time of the murder was seventy-eight years old, usually went to Boston daily to attend to what little business there was left to him. The other members of the family were his son Harold and daughter Mable, and, a single servant, Army Roberts. Harold Page was about thirty-five, Harvard graduate, and employed as a clerk at the South Terminal Station in Boston. Amy Roberts had been in the Page household for six years and was regarded almost as a member of the family rather than as a servant. Mable Page, the murdered woman, was forty-one years old.

On March 31, 1904, Harold Page went to Boston early in the morning as usual. The father went to Auburndale a little later. Amy Roberts left the house at half-past ten to spend the day in Cambridge and Boston, leaving Miss Page alone. The father, returning home early, found the dead body of his daughter lying on the floor of her bed-room in the second storey of the house, at about half-past two in the afternoon. She had her hat on and was completely dressed to go out except her overskirt. Nothing in the house was out of place or in any way disarranged except the rug outside of the door to her room. The local physician was sent for. He observed a horrible jagged wound in the neck, of the type frequently found in suicides. Without further examination he telephoned to the medical examiner that there was a case of probable suicide requiring his attention. The medical examiner arrived that evening and found that there were two wounds in the neck and several cuts on the hands. He concluded to wait until daylight to perform an autopsy, and seemed, upon his first observation, to have regarded the case as one of suicide, although he was much mystified at the failure to find any weapon. When the undertaker was caring for the body late that night, he discovered for the first time that there was a deep wound in the back, eliminating any possibility of suicide. At the autopsy the following morning still another wound was found, this one in the chest and penetrating through the heart. Aside from the knife wounds there was no other indication of violence on the body. As a result of this first impression that it was suicide the murderer had a day's start in which to cover his traces, before the investigation of the crime began.

Soon after discovering his daughter's body, Mr. Page found downstairs in the living room a note in her handwriting, evidently meant for him, written on both sides of a piece of paper torn from a small book near at hand, which read as follows:—"Have just heard Harold is hurt and is at Massachusetts Hospital. Have gone in twelve o'clock. Will leave key of front side door with key of barn stairs. Will telephone to Mrs. Bennett."

The "Massachusetts Hospital" meant the Massachusetts General Hospital in Boston. Mrs. Bennett was a neighbour whose telephone the Pages occasionally used. It was clear that this message about her brother had been given to her by her assassin, either to get her out of the house or to explain his presence there, for her brother had met with no accident, but was at his work as usual. The note furnished this important clue to the identity of the murderer,—it must have been someone who knew that she had a brother who worked in Boston.

On the floor of her bed-room near her body were her gloves and

veil, and on top of them was a slip of paper from the same block, or which was written in a rather scrawly hand merely these words in pencil.

"J. L. MORTON, Charlestown, Mass."

This was found to be a fictitious address. An examination of the house showed that there was missing from a pocket-book in a drawer in the large living-room some money which had been there on the morning of the murder, amounting to at least twelve dollars. From Miss Page's room two stickpins were missing.

The defendant, Charles L. Tucker, lived in Auburndale, not far from the bridge to Weston. He was twenty-four years old and had been married, but his wife had been drowned a few months afterwards, while canoeing with him. At the time of the murder he was without employment. He had been endeavouring for several days to raise funds by selling or pawning many of his personal effects and much of his clothing. He was slightly acquainted with Harold Page and had called to see him at the Page house on at least two occasions. It was ascertained that he had been seen on Weston bridge going in the direction of the Page house on the day of the murder at about noon. Accordingly, on April 4, he was questioned by the police as to his whereabouts that day. He stated that he had worked about his house all the morning until lunch time and then took a walk across the bridge, out South Avenue, but claimed that he turned off at Cutter's Corner a third of a mile before reaching the Page house, and then returned home in a rather roundabout way. At that time there was nothing known to the police to control his story, and no further action was taken on that day. But there were facts which were soon to become known that forcibly verify the truth of the old saying, "Murder will out." Early in the afternoon of the murder, Tucker dropped from his pocket a knife-sheath upon the seat of a market wagon which he had boarded on Weston bridge and on which he rode a little distance. On the end of the sheath there were imprints of teeth of peculiar shape and it was later found that Tucker's front teeth exactly fitted into them. The boy who was driving the team picked it up after Tucker left, and acting on the principle that "finding is keepings," put it in his pocket and did not think of it again until he saw by the newspapers that Tucker had been examined in connection with the Page murder. Through his father the sheath was turned over to the police, and Tucker was again, on April 9, summoned to police headquarters and questioned; this time with a stenographer present. He made numerous false statements with reference to facts, which tended to connect him with the murder. Among the most significant were those with reference to the sheath and knife. When the sheath was produced at this interview, Tucker evidently thought that the officer had taken it from his (Tucker's) overcoat pocket. He asserted that it was his, but that he did not have it with him the day of the murder, and that it had been at home in his room all the time since the murder. He maintained very vigorously that he owned no hunting-knife, or any other kind of knife, and had not owned one for years. Before the interview was finished some officers who had been searching his room came in. They had found in a coat pocket in his room, the blade of hunting-knife broken into several pieces; the cutting edge had been chipped and bent, and an attempt had been made by filing to obliterate the maker's name. When Tucker was confronted with this, he admitted that it was his knife, and that he had broken it up for fear that it would connect him with the murder. That knife, when whole, fitted into the



sheath ; and that knife, according to the testimony of all but one of the medical experts, could have made all of the wounds in Miss Page's body ; and according to the testimony of the physicians called by the Government, the wounds, from their appearance, measurement and character, must have been made by a knife of this type. In that same pocket of Tucker's from which the broken pieces of the knife were taken, a Canadian stickpin was also found. Tucker was arrested after the interview on April 9 ; " probable cause " was found at the preliminary hearing before the district Court on April 22. He was indicted for murder at the June sitting of the Grand Jury, and after one postponement came to trial on January 21, 1905. The trial lasted twenty days exclusive of Sundays, and resulted in a verdict of guilty of murder in the first degree." The greater part of the time was taken by the testimony of expert witnesses, and yet the issues which concerned them were far from the vital ones in the case. In a capital trial in Massachusetts, the State not only pays the defendant's counsel and summon such witnesses as he desires, but the Court may on motion authorize the employment of experts on his behalf, — who are also paid by the State. The defence in this case was authorized to employ six experts on handwriting, but by agreement of counsel four only testified on each side. The experts consulted by the Government had reported that the J. L. Morton address was in Tucker's handwriting. The defendant's experts then examined the standards, and declared that Tucker had not written it, but with equal positiveness said that it was clearly in the handwriting of Mabel Page. The District Attorney distinctly stated in opening the case that the Morton address was relied on only as confirming the other undoubted facts, and there was other evidence tending to show that " Morton " would be a likely name for Tucker to choose if he were giving a false name to Miss Page. This included the fact that there was a J. D. Morton who worked at the South Terminal Station in that part of the building where Tucker was formerly employed. There was also a postal card found in Tucker's pocket, on which he had written four fictitious addresses a few days after the murder. On this card the name of Morton appeared in one address, and " Charlestown, Mass. " in another. The testimony of the experts on this point, however, of necessity took much time, and for that reason this seems to have been regarded in many quarters as the vital issue of the case. The method of employing experts militates against a fair and impartial opinion. The income of the handwriting experts comes chiefly from their services in litigated cases. They know that in any given case, unless their opinion coincides with the contention of the counsel who consults them, their remuneration will be little or nothing. The most conscientious man can hardly give an entirely unbiased opinion under these circumstances. The medical expert testimony presented in many respects a refreshing contrast to the handwriting testimony. Although there was some apparent inconsistencies in their opinions, except possibly in one instance, they were easily reconcilable and, due to the different hypotheses in the questions propounded to them by the Government and the defence.

To illustrate : Prof. Wood of the Harvard Medical School called by the Government, testified that there were blood stains on the back of the knife ; that he examined them on April 10, and found that the blood corpuscles were  $\frac{1}{3,250}$  of an inch in diameter, showing that the blood was con-

sistent with that of human being and certain wild animals such as the monkey and seal. There was not enough blood present to make the further and more decisive chemical test. Dr. Leary for the defendant testified



that he examined the knife several months later and found that the blood corpuscles were  $\frac{1}{4,100}$  of an inch in diameter, and that the blood was consistent not only with that of a human being and of animals mentioned by Prof. Wood, but also with several other of the commoner wild and household animals; yet, this apparent inconsistency of results was accounted for by both witnesses by the fact that the diameter of the blood corpuscles would tend to be diminished in the course of time by the action of moisture and of rust. The defendant called a witness, a labourer, who testified that he saw Tucker on East Newton Street just after he had turned off South Avenue, that he had come from the direction of Auburndale and not from the direction of the Page house, that it was then between twenty and twenty-five minutes past twelve, and that he fixed the time from the fact that he himself arrived at the Barn at Cutter's Corner at twelve o'clock, and found his dinner waiting for him, and also that he looked at his watch a few minutes after Tucker went by and that it was then half-past twelve. This witness illustrated very interestingly the workings of the human mind when it is surrounded by a continuous discussion of some question of great importance. This man's daughter was a witness for the defendant and testified to seeing Tucker on the bridge that day. There seemed to be little doubt but that the witness was trying to tell the truth and that he believed what he was saying. Yet it appeared from statements made by him to credible witnesses from a deposition of his and from his sworn testimony before the Grand Jury, that there had been a gradual progress to his definite conclusion from a very hazy starting point. When first interrogated by his employer shortly after the murder, he said that he had seen a young man on the day of the murder but couldn't say that it was Tucker, nor could he say when he saw him. Two weeks later, after the preliminary hearing in the case at which his daughter testified, he first came to the conclusion that he had really seen Tucker on East Newton Street, but he could not then say what direction he had come from. He then began to work out the time; his first approximation was somewhere between twelve and one; he testified to the Grand Jury that his idea of time was all an estimate, and that he did not look at his watch between five minutes to twelve and one o'clock. On the witness-stand at the trial after the lapse of ten months he remembered for the first time that he looked at his watch at half-past twelve and so was able to fix the time that he saw Tucker almost to the minute. It is not uncommon to find a witness believing after a time that he has seen things that he has heard frequently spoken about, but it is seldom that the different stages of the formation of a belief can be traced as closely as here. An enlargement of the negative showed that it was an enamel pin in the shape of a shield with a crown on top, but bearing the Spanish coat-of-arms. Thereupon the defence produced the very pin which the photograph represented, and then argued that it was so different from the Canadian pin that the witnesses for the defendant could not have referred to the Spanish pin when they were testifying. If upon this testimony the Jury was satisfied that the pin found in Tucker's pocket was Mabel Page's, and after listening to the evidence it is hard to see how they could have arrived at any other result, the conclusion from this point alone that the defendant was guilty was irresistible. The critics of circumstantial evidence should note that the question whether the pin belonged to Mabel Page or the defendant was settled solely and wholly by direct evidence. The Jury returned a verdict of guilty. See 2 Cr. L. J. (Jour.) pp. 90—97.

(iii) "Jaques Du Moulin, a French refugee, having brought over his family and a small sum of money, employed it in purchasing lots of goods that had been condemned at the custom house, which he again disposed of by retail; as these goods were such as having a high duty were frequently smuggled, those who dealt in this way were generally suspected of increasing their stock by illicit means, and smuggling, or purchasing smuggled goods, under colour of dealing only in goods that had been legally seized by the King's officers, and taken from smugglers. This trade, however, did not in the general estimation impeach his honesty though it gave no sanction to his character; but he had been often detected in uttering false gold; he came frequently to persons of whom he had received money, with several of these pieces of counterfeit coin, and pretended that they were among the pieces which had been paid him; this was generally denied with great eagerness, but if particular circumstances did not confirm the contrary, he was always peremptory and obstinate in his charge. This soon brought him into disrepute, and he gradually lost not only his business but his credit. It happened that having sold a parcel of goods, which amounted to seventy-eight pounds to one Harris, a person with whom he had before no dealings, he received the money in guineas and Portugal gold several pieces of which he scrupled, but the man having assured him that he himself had carefully examined and weighed those very pieces and found them good, Du Moulin took them and gave his receipt.

In few days he returned with six pieces, which he averred were of base metal, and part of the sum which he had a few days before received of him for the lot of goods. Harris examined the pieces and told Du Moulin that he was sure they were none of them among those which he had paid him, and refused to exchange them for others. Du Moulin as peremptorily insisted on the contrary alleging that he had a drawer by itself, and locked it up till he offered it in payment of a bill of exchange, and then the pieces were found to be bad, insisting that they were the same to which he had objected. The man now became angry, and charged Du Moulin with intending a fraud. Du Moulin appeared to be rather piqued than intimidated at his charge and swore that these were the pieces he received of Harris. Harris was at length obliged to make them good; but as he was confident Du Moulin had injured him by a fraud, supported by perjury he told his story wherever he went, exclaiming against him with great bitterness and met with many persons who made nearly the same complaints, and told him that it had been a practice of Du Moulin's for a considerable time. Du Moulin now found himself universally shunned and hearing what Harris had reported from all parts, he brought his action for defamatory words, and Harris, irritated to the highest degree, stood upon his defence; and in the meantime having procured a meeting of several persons who had suffered the same way in their dealings with Du Moulin, they procured a warrant against him, and he was apprehended upon suspicion of counterfeiting the coin. Upon searching his drawers a great number of pieces of counterfeit gold were found in a drawer by themselves, and several others were picked from other money, that was found in different parcels in his scrutoire; upon further search a flask, several files, a pair of moulds, some powdered chalk, a small quantity of Aqua Regia, and several other implements were discovered. No doubt could now be made of his guilt, which was extremely aggravated by the methods he had taken to dispose of the money he made, the insolence with which he had insisted upon its being paid him by others, and the perjury by which he had supported his claim; his action against Harris for defamation was also considered as greatly

increasing his guilt and everybody was impatient to see him punished. In these circumstances, he was brought to his trial and his many attempts to put off bad money, the quantity found by itself in his scrutoire, and above all, the instruments of coining which upon a comparison, exactly answered the money in his possession, being proved he was upon their evidence convicted, and received sentence of death. It happened that a few days before he was to have been executed one Williams, who had been bred a seal engraver, but had left his business, was killed by a fall from his horse; his wife, who was then big with child, and near her time, immediately fell into fits and miscarried; she was soon sensible that she could not live and therefore sending for the wife of Du Moulin, she desired to be left alone, and then gave her the following account:—

That her husband was one of four, whom she named that had for many years subsisted by counterfeiting gold coin, which she had been frequently employed to put off and was, therefore, entrusted with the whole secret; that another of these persons had hired himself to Du Moulin as a kind of footman and porter, and being provided by the gang with false keys, had disposed of a very considerable sum of bad money, by opening his master's scrutoirs and leaving it there in the stead of an equal number of good pieces which he took out; that by this iniquitous practice Du Moulin had been defrauded of his business, his credit and his liberty, to which in small time his life would be added, if application was not immediately made to save him; by this account which she gave in great agony of mind, she was much exhausted and having given directions where to find the persons whom she impeached, she fell into convulsions and soon after expired. The woman immediately applied to a Magistrate and having related the story she had heard, procured a warrant against three men, who were taken the same day, and separately examined. Du Moulin's servant steadily denied the whole charge and so did one of the other two; but while the last was being examined, a messenger who had been sent to search their lodging, arrived with a great quantity of bad money and many instruments for coining. This threw him into confusion, and the Magistrate improving the opportunity by offering his life, if he would become an evidence for the king, he confessed that he had been long associated with the other prisoners and the man that was dead, and he directed where other tools and money might be found, but he could say nothing as to the manner in which Du Moulin's servant was employed to put it off. Upon this discovery Du Moulin's execution was suspended, and the King's witness swearing positively that his servant and the other prisoner had frequently coined in his presence, and giving a particular account of the process and the part which each of them usually performed, they were convicted and condemned to die. Both of them however still denied the fact, and the public were still in doubt about Du Moulin. In his defence he had declared that the money which was found together, was such as he could not trace to the persons of whom he had received it, that the parcels in which had money was found mixed, he kept separate, that he might know to whom to apply, if it should appear to be bad, but the finding of the moulds and other instruments in his custody was particularly not yet accounted for; as he only alleged in general terms, that he knew not how they came there, and it was doubted whether the impeachment of others had not been managed with a view to save him who was equally guilty, there being no evidence of his servant's treachery,

but that of a woman who was dead, reported at second hand by the wife of Du Moulin who was manifestly an interested party. He was not, however, charged by either of the convicts as an accomplice, a particular which was strongly urged by his friends in his behalf; but it happened that while the public opinion was thus held in suspense a private drawer was discovered in a chest that belonged to his servant and in it a bunch of keys and the impression of one in wax. The impression was compared with the keys, and that which it corresponded with, was found to open Du Moulin's scrutoire, in which the bad money and implements had been found. When this particular, so strong and unexpected, was urged, and the key procured, he burst into tears, and confessed all that had been alleged against him; he was then asked how the tools came in his master's scrutoire and he answered that when the officers of justice came to seize his master, he was terrified for himself, knowing that he in his chest had these instruments, which the private drawer would not contain and fearing that he might be included in the warrant, his consciousness of guilt kept him in continual dread and suspicion; that for this reason, before the officers went upstairs he opened the scrutoire with his false key, and having fetched his tools from box in the garret, he deposited them there and had just locked it when he heard them at the door.

In this case even the positive evidence of Du Moulin, that the money he brought back to Harris was the same he had received of him, was not true, though Du Moulin was not guilty of perjury either wilfully or by neglect, inattention or forgetfulness. And the circumstantial evidence against him, however strong, would only have heaped one injury upon another and have taken away the life of an unhappy wretch from whom a perfidious servant had taken away everything else. See 6 M. L. T. 71—79 (four)

(iv) A gentleman died possessed of a very considerable fortune, which he left to his only child, a daughter, and appointed his brother to be her guardian and executor of his will. The young lady was then about eighteen; and if she happened to die unmarried, without children, her fortune was left to her guardian and to his heirs. As the interest of the uncle was now incompatible with the life of the niece, several other relations hinted that it would not be proper for them to live together; whether they were willing to prevent any occasion of slander against the uncle, in case of the young lady's death; whether they had any apprehension of her being in danger or whether they were only discontented with the father's disposition of his fortune, and therefore propagated rumours to the prejudice of those who possessed it, cannot be known; the uncle however, took his niece to his house near Epping Forest and soon afterwards she disappeared. Great inquiry was made after her, and it appearing that the day she was missing, she went out with her uncle into the forest, and that he returned without her, he was taken into custody. A few days afterwards he went through a long examination in which he acknowledged that he went out with her, and pretended that she found means to loiter behind him as they were returning home; that he sought her in the forest as soon as he missed her; and that he knew not where she was or what was become of her. This account was thought improbable, and his apparent interest in the death of his ward and perhaps the petulant zeal of other relations, concurred to raise and strengthen suspicions against him and he was detained in custody. Some

new circumstances were everyday rising against him. It was found, that the young lady had been addressed by a neighbouring gentleman, who had, a few days before she was missing, set out on a journey to the north; and that she had declared she would marry him when he returned, that the uncle had frequently expressed his disapprobation of the match in very strong terms; that she had often wept and reproached him with unkindness and an abuse of his power. A woman was also produced, who swore, that on the day the young lady was missing, about eleven o'clock in the forenoon she was coming through the forest and heard a woman's voice expostulating with great eagerness; upon which she drew nearer the place, and before she saw any person heard the same voice say "*Don't kill me, uncle don't kill me;*" upon which she was greatly terrified and immediately bearing the report of a gun very near, she made all the haste she could from the sport, but could not rest in her mind till she had told what had happened.

Such was the general impatience to punish a man who had murdered his niece to inherit her fortune that upon this evidence he was condemned and executed. About ten days after the execution, the young lady came home. It appeared, however, that what all the witness had sworn was true, and the fact was found to be thus circumstanced:

The young lady declared that having previously agreed to go off with the gentleman that courted her, he had given out that he was going on journey to the north; but that he waited concealed at a little house near the skirts of the forest, till the time appointed, which was the day she disappeared. That he had horses ready for himself and her, and was attended by two servants also on horseback. That as she was walking with her uncle he reproached her with persisting in her resolution to marry a man of whom he disapproved, and after much altercation she said with some heat *I have set my heart upon it. If I do not marry him it will be death; and don't kill me, uncle, don't kill;* that just as she had pronounced these words she heard a gun discharged very near her, at which she started, and immediately afterwards saw a man come forward from among the trees, with a wood-pigeon in his hand that he had just shot. That coming near the place appointed for their rendezvous, she found a pretence to let her uncle go on before her, and her suitor waiting for her with a horse, she mounted and immediately rode off. That instead of going into the north, they retired to a house, in which he had taken lodgings, near Windsor, where they were married the same day, and in about a week, went a journey of pleasure to France, from whence, when they returned, they first heard of the misfortune which they had inadvertently brought upon their uncle.

So uncertain is human testimony, even which the witnesses are sincere and so necessary is a cool and dispassionate inquiry and determination, with respect to crimes that are enormous in the highest degree, and committed with every possible aggravation. See 6 M. L. T. 61—79.

(v) Where honest witnesses make conflicting statements, and it is necessary to ascertain which of them has sworn truly, much depends upon the powers of perception and memory of the witnesses, and upon their ability to narrate correctly the events which they witnessed, for in order to give a true account of what he has seen, a witness must have a correct perception of what he saw, and a memory which is *retentive enough* to enable him to recall with accuracy all that passed in his presence. The line of demarcation between imagination and memory, however, is sometimes hard to draw, and it is unquestionably true that witnesses testify to things which they imagine

have occurred, but which in fact have had no existence: the memory is deceitful and unreliable, and the things which are stored away in it receive colour from existing impressions and experiences; the new things are mingled with the old. A writer of ability says upon this matter: "Men have seen a very simple fact; gradually when it is distant, in thinking of it, they interpret it, amplify it, provide it with details, and these imaginary details become incorporated with the details, and seem themselves to be recollections." An instance is related by Ram of witnesses in a trial in Scotland, who were unable to separate what they had read in a newspaper from what they heard from the parties. The experienced cross-examiner, therefore, will not take the statements of honest witnesses for granted, but will investigate them thoroughly, and endeavour to show that they are mistaken as to what they think they heard or saw, and will, in the mildest and most patient manner, prove, by his examination of a witness who believes that he is telling the truth, that, from the surrounding circumstances and the testimony of the other witnesses as well as from the unreasonableness of his story, his evidence cannot be relied upon. For other illustrations see Prem's Law and Methods of Police Investigation 1947 Ch. 13 at p. 176.

## CHAPTER 90

### Of Hostile Witness

#### *Who is a Hostile Witness—Value of his Testimony*

1. A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth in the Court. The Court may, in its discretion, permit the person who calls the witness to put any question to him which might be put in cross-examination by the adverse party. See S. 154, Indian Evidence Act.

2. When a witness proves hostile, it is well to get rid of him as quickly as possible. If the Court is satisfied that a witness is really adverse to the cause of the party on whose behalf he has been summoned, it will relax the rule prohibiting leading questions, and will allow the examination-in-chief to be conducted on the lines of a cross-examination but the attorney who has so called a witness is always under a disadvantage, as by having called him he has impliedly vouched for his credibility. If counsel is surprised by the hostile attitude of a witness, he should boldly expose the hostility so unexpectedly discovered, in order that the motives for testifying are clearly apparent to the Court and jury. 14 Cr. L. J. p. 18.

3. It is the cross-examination of an adverse witness which is commonly considered as the surest test of the knowledge and skill of the advocate. It requires a greater intellectual effort to conduct a cross-examination than an examination of one's own witnesses, and taxes the ingenuity and resources of the lawyer. When the Court is satisfied that the witness is really an adverse one, the strict rule which forbids leading questions will be relaxed, and you will be permitted to conduct the examination somewhat more after the manner of a cross-examination. You may put leading questions, but you may not discredit him, whatever may have been the testimony, and however obvious the animus which has misrepresented the facts purposely for the injury of your cause. He is still your witness, and having chosen to call him, and thereby to ask the jury to believe his story, it is not competent to you to turn round when you find he does not suit your purpose, an endeavour to show to the jury that he is unworthy of credit. Between this Scylla and Charybdis lies your difficult course in dealing with such a witness. As a

general rule, the less you say to such a witness the better for you. Bring him directly to the point which he is called to prove, frame your questions so that they should afford the least possible room for evasion, or, what is still worse, explanation. Avail yourself of liberty to lead as soon as you can, that is, as soon as you have laid the foundation for it by showing from his manner that the witness is really adverse. You should not conceal your knowledge of the fact that the witness is hostile. Provoke him when he appears to be friendly, to an exhibition of hostility in order to show that he is an enemy in the guise of a friend. By pursuing this course you will prevent the witness from imposing upon you, and will expose his treachery and perfidy to the Court and jury." (Cox's Advocate).

An advocate should not cross-examine his own witness, because it will create a doubt that he does not consider the testimony reliable. The rule is, of course, subject to exceptions, e.g., when the witness is adverse or a stupid one, he may be cross-examined with the permission of the Court. Harris says: "*Never cross-examine your own witness.* This again seems remarkably obvious. But it requires an effort to obey it nevertheless. You will hear an advocate cross-examine his witness over and over again without knowing it, if he have not the restraining hand of his leader to check him." See Harris, p. 37.

As to the value of the evidence of hostile witness the following judicially decided cases may be noted:—

A witness is hostile if he tries to defeat the party's case by suppressing the truth. Mere changing of version is immaterial. 13 C. 53, 49 C. 93, 1930 C. 276 : 57 C. 1266, 53 C. 372. See 37 C. L. J. 173, 47 C. 1043, 1933 P. 517. Before a prosecution witness can be declared hostile there should be ground for believing that the statement he made in favour of defence is due to animity to the prosecution. 44 I. C. 33 : 19 Cr. L. J. 241 : 1918 P. 254 : 3 P. L. J. 419. If a question of the nature of cross-examination is put to one's own witness without declaring him hostile, the question and answer are both inadmissible and cannot be taken into consideration. 1 P. 7-8 : 71 I. C. 117, 53 C. 372 : 1926 C. 139 : 27 Cr. L. J. 266 : 92 I. C. 442. A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the Court. 31 Cr. L. J. 1207 : 1930 C. 276 : 57 C. 1266, 49 C. 93, 13 C. 53. Where a prosecution witness is cross-examined by the prosecution as hostile, his evidence should be rejected altogether. 56 C. 145, 53 C. 372, 71 I. C. 657, 1930 C. 276 : 57 C. 1266, 47 C. 1043, 1923 C. 463, *contra* 36 C. W. N. 356, 106 I. C. 100 : 1927 Bom. 501, 9 P. 474, 1923 C. 463 : 71 I. C. 657. If a witness unexpectedly turns hostile in cross-examination and the defence has elicited new matter from a prosecution witness, the Court may under S. 154 permit the prosecution to test the witness's veracity on this point by cross-examining him in turn. 42 C. 957. If a witness is called by the prosecution and then cross-examined as hostile, his evidence should not on that account be left out of account. It should go along with other evidence to the jury to decide the truth. 36 C. W. N. 356 : 1932 C. 523, 930 P. 247 : 124 I. C. 836 : 31 Cr. L. J. 721 : 9 P. 474. The fact that the statement of the witness differed from the statement recorded by the Sub-Inspector shortly after the occurrence, is not a sufficient reason to cross-examine him as hostile. 1923 C. 463 : 24 Cr. L. J. 193, 1930 C. 276. If the defence is compelled to call a prosecution witness as defence witness, the defence has the right to cross-examine him. 28 C. 594. The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference in such a case is that he



is neither hostile to this side nor that, but that the witness is such that he should not be believed unless supported by other evidence. 13 C. 53, 2 C. 642 (644), 61 C. 399 : 1934 C. 636. Before contradicting a witness by a previous statement, it must be shown to have been made voluntarily. 1934 C. 636 : 61 C. 399. A witness who has resiled from some portion of his statement, and who has been allowed to be cross-examined by the prosecution, may be believed partly. 1935 B. 36 : 154 I. C. 600 : 37 Cr. L. J. 532. Cross-examination of a hostile witness is in the discretion of Court. Permission should be freely given 1933 P. 488 : 34 Cr. L. J. 892. Simply because a witness is declared hostile his evidence cannot be considered worthless. 1933 P. 517 : 146 I. C. 993, 1931 C. 401 : 58 C. 1404. The definition that a hostile witness is one who is not desirous of telling the truth is dead and buried. 1933 P. 517, 58 C. 1404. If prosecution apprehends that a witness will not adhere to the statement already made, it cannot directly ask him if he made any statement. It can be asked in cross-examination only when he is declared hostile. 1 P. 758 : 1923 P. 62, 20 A. 155. That the testimony of a witness is adverse to party calling him is sufficient to obtain leave to cross-examine him. Value of his testimony should be judged from cross-examination. 1933 P. 517 : 146 I. C. 993, but see 1934 A. 226, 6 C. W. N. 513 Rel. on. Either side can rely upon the evidence of hostile witness, but the evidence must be considered as a whole. 1933 P. 517 : 146 I. C. 993. The fact that witness's answer is in direct conflict with evidence of other prosecution witnesses is no reason for declaring him hostile. 1936 M. 56. It must be shown that statement made in favour of defence is due to enmity to the prosecution. 44 I. C. 33 : 19 Cr. L. J. 241. Police diary can be referred to by prosecution to see whether a witness has turned hostile 1918 P. 459. The mere fact that a witness tells a different story from that told by him before does not necessarily make him hostile. 13 C. 53, 37 C. L. J. 173. If a witness is not examined but only tendered, he cannot be allowed to be cross-examined by the prosecution. 7 P. 55=1928 P. 203, 1941 C. 533. A witness who had been treated as hostile witness, cannot be treated as such at once and cross-examined by the prosecution without being examined in chief. 1941 C. 533=45 C. W. N. 763. For other cases see *Prem's Criminal Practice* 1947.

### Witness turning Hostile in Cross-examination

Where a witness called and examined-in-chief by a party turns out in cross-examination to be biased in favour of the cross-examiner and makes statements adverse to the party producing him, the Court has the discretion to permit the party producing the witness to challenge by way of cross-examination the veracity of the witness with regard to the matters deposed to by him in his cross-examination and not connected with the matters deposed to by him in examination-in-chief. 42 C. 957 : 29 I. C. 513, 6 C. W. N. 513 (P. C.).

### In Will Cases

S. 154 of the Evidence Act provides that the Court may, in its discretion, permit the party who calls a witness to put any question to him which might be put in cross-examination by the adverse party. There is, in this respect, no distinction on principle between an attesting witness whom a party is obliged to call and any other witness whom he may cite of his own choice. But the Court may, in the exercise of its discretion, be more easily persuaded in the former case than in the latter to grant the permission. In view of the provisions of the Evidence Act, it is thus plain that there is no room for application in this country, of the view taken in the cases that a necessary witness, that is, one whom a party is



compelled to call and who may therefore be considered rather the witness of the Court than of the party, as an attesting witness to a will, can be discredited as of right by his own side. (1840—44) 2 Moo. & Rob. 501, (1861) 124 P. R. 734, (1866) 35 L. J. P. 40, 47 C. 1043 : 59 I. C. 814 : 1921 C. 677. Testamentary proceedings furnish an admirable example of the meaning of S. 154. The only surviving witness to a Will may be unwilling to depose in favour of the executor who applies for probate. He may, however, be more unwilling to commit perjury, and if cross-examined, a few leading questions suggesting the essential facts may elicit all that is necessary to entitle the Court to direct probate to issue. 1931 C. 401 : 131 I. C. 575, 32 Cr. L. J. 768 : 1931 Cr. C. 497 (F. B.)

### Illustration

Counsel should never cross-examine his own witness.

This again, seems remarkably obvious. But it requires an effort to obey it nevertheless. You will hear an advocate cross-examine his witness over and over again without knowing it, if he have not the restraining hand of his leader to check him.

Before Mr. Justice Hawkins, not long since, a junior was conducting a case, which seemed pretty clear upon the bare statement of the prosecutor. But he was asked

Q. Are you *sure* of so and so ? ” A. “ Yes.”

Q. Quite ? ” A. “ Quite.”

Q. You have no doubt ? ”

A. Well,” answered the witness, “ I haven’t much doubt, because I asked my wife.”

Q. Mr. Justice Hawkins : “ You asked your wife in order to be sure in your own mind ? ” A. “ Quite so, my Lord.”

Q. “ Then you had some doubt before ? ”

A. “ Well, I may have a little, my Lord.”

This ended the case, because the whole question turned up on the absolute certainty of this witness’s mind. See Harris, p. 37.

## CHAPTER 91

### Of Ignorant and Illiterate Witnesses

In India 90 per cent. of the population is illiterate and they live in villages. Their manner of giving evidence is quite different from that of their brethren living in towns and cities. It cannot be denied that in majority of the villages there is party faction. Generally you find the population divided into two or three factions led by their own party leaders. Great difficulty is experienced by Police Officers in arriving at the truth in serious cases involving life and property, when witnesses are unwilling to give testimony on account of their party faction when they are actually eye-witnesses to the crime. Even in the case of truthful witnesses their manner of giving evidence is quite peculiar, e.g., they will never say that there was general kicking and beating but they will work out an analysis of fists and feet, and right side and left side, which is easily shown to be ridiculous but it does not prove that they are telling lies, it is merely their habit of thought and speech. 13 I. C. 45 : 31 Cr. L. J. 477 : 1930 M. W. N. 74.

Sometimes their evidence is thrown out on the ground that they are

poor. It cannot be affirmed as a general rule that the person is not trustworthy because he is not wealthy. *See* 49 C. 13. Where the witnesses are partisans, there is always a tendency to strain a point in favour of a friend. It is doubtful if they can conceive that they are, thereby, doing something improper. 1929 O 494 : 119 I. C. 337. Where the case is between two rival factions in a village and all witnesses against the accused belong to the family of the deceased, some corroboration is necessary, otherwise accused should be given the benefit of doubt. 1935 L. 130. In case of party faction, evidence of either party should not be believed unless it is borne out by some documentary evidence. 1927 M. 820 : 103 I. C. 134.

"Witnesses, and particularly ignorant and illiterate witnesses," said Lord Langdale, "must always be liable to give imperfect or erroneous evidence, even when orally examined in open Court. The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination, as it is too often conducted, may give rise to important errors and omissions; and the truth is to be elicited, not by giving equal weight to every word the witness may have uttered, but by considering all the words with reference to the particular occasion of saying them, and to the personal demeanour and deportment of the witness during the examination. All the discrepancies which occur, and all that the witness says in respect of them, are to be carefully attended to, and the result, according to the special circumstances of each case, may be, either that the testimony must be altogether rejected, on the ground that the witness has said that which is untrue, either wilfully or under self-delusion, so strong as to invalidate all that he has said, or else the result must be that the testimony must, as to the main purpose, be admitted, notwithstanding discrepancies which may have arisen from innocent mistake, extending to collateral matters, but perhaps not affecting the main question in any important degree. 5 Beav. 597. In the case of ignorant villagers, reference to time is generally approximate, and there is large margin of honest errors. 19 I. C. 328 : 15 Bom. L. R. 297.

## CHAPTER 92

### Of Newspaper Correspondents

The newspaper correspondents sometimes exaggerate the facts in order to create sensation. They freely import fiction into facts and spice their stories.

**Illustration.**—One Mr. Minnock, a newspaper correspondent published an article in the *New York World* of the 15th December, 1900. The story ran as follows :—At supper time on Wednesday evening, when the Frenchman, Mr. Hilliard, refused to eat his supper, the nurse, Davis, started for him, Hilliard ran around the table, and the other two nurses Dean and Marshall, headed him off and held him : they forced him down on a bench, Davis called for a sheet, one of the other two, I do not remember which, brought it, and Davis drew it around Hilliard's neck like a rope. Dean was behind the bench on which Hilliard had been pulled back; he gathered up the loose ends of the sheet and pulled the linen tight around Hilliard's neck, then he began to twist the folds in his hand. I was horrified. Dean and Marshall seized the helpless man's hands; slowly, remorselessly, Davis kept on twisting the sheet. Hilliard began to get black in the face; his tongue was hanging out.

Marshall got frightened. "Let up, he is getting black!" he said to Davis. Davis let out a couple of twists of the sheet but did not seem to like to do it. At last Hilliard got a little breath—just a little. The sheet was still brought tight about the neck. "Now will you eat?" cried Davis. "No," gasped the insane man. Davis was furious. "Well, I will make you eat; I will choke you until you eat," he shouted, and he began to twist the sheet again. Hilliard's head would have fallen upon his breast but for the fact that Davis was to hold it up. He twisted the sheet until his own fingers were sore, then the three nurses dragged the limp body to the bath-room, heaved him into the tub with his clothes on, and turned the cold water on him. He was dead by this time, I believe. He was strangled to death, and the finishing touches were put on when they had him on the floor. No big, strong, healthy man could have lived under that awful strangling. Hilliard was weak and feeble. When the reporter, Minnock, stepped to the witness-stand, the Court room was crowded, and yet so intense was the excitement that every word the witness uttered could be distinctly heard by everybody present. He gave his evidence-in-chief clearly and calmly, and with no apparent motive but to narrate correctly the details of the crime he had seen committed. Any one unaware of his career would have regarded him as an unusually clever and apparently honest and courageous man with keen memory and with just the slightest touch of gratification at the important position he was holding in the public eye in consequence of his having unearthed the atrocities perpetrated in our public hospitals.

His direct evidence was practically a repetition of his newspaper article already referred to, only much more in detail. The cross-examination then proceeded:—

Q. (Amicably). "Mr. Minnock, I believe you have written the story of your life and published it in the Bridgeport Sunday Herald as recently as last December? I hold the original article in my hand."

A. "It was not the story of my life."

Q. "The article is signed by you and purports to be a history of your life." A. "It is an imaginary story dealing with hypnotism. Fiction, partly, but it dealt with facts."

Q. "That is, you mean to say you mixed fiction and fact in the history of your life?" A. "Yes, sir."

Q. "In other words, you dressed up facts with fiction to make them more interesting?" A. "Precisely."

Q. "When in this article you wrote that at the age of twelve you ran away with a circus, was that dressed up?" A. "Yes, sir."

Q. "It was not true?" A. "No, sir."

Q. "When you said that you continued with this circus for over a year, and went with it to Belgium, there was a particle of truth in that because you did, as a matter of fact, go to Belgium, but not with the circus as a public clown; is that the idea?"

A. "Yes, sir."

Q. "So there was some little truth mixed in at this point with the other matter?" A. "Yes, sir."

Q. "When you wrote that you were introduced in Belgium at the Hospital General, to Charcot, the celebrated Parisian hypnotist, was there some truth in that?" A. "No, sir."

Q. "You knew that Charcot was one of the originators of hypnotism in France, didn't you?" A. "I know that he was one of the original hypnotists."

Q. "How did you come to state in the newspaper history of your life that you were introduced to Charcot at the Hospital General at Paris if that was not true?" A. "While there I met a Charcot."

Q. "Oh, I see." A. "But not the original Charcot."

Q. "Which Charcot did you meet?" A. "A Woman. She was a lady assuming the name of Charcot, claiming to be Madame Charcot."

Q. "So that when you wrote in this article that you had met Charcot, you intended people to understand that it was the celebrated Professor Charcot it was partly true, because there was a woman by the name of Charcot whom you had really met?"

A. "Precisely."

Q. "That is to say, there was some truth in it?" A. "Yes, sir."

Q. "When in that article you said that Charcot taught you to stand pain, was there any truth in that?" A. "No."

Q. "When you said in this article that Charcot began by sticking pins and knives into you, little by little, so as to accustom you to standing pain, was that all fiction?" A. "Yes."

Q. "When you wrote that Charcot taught you to reduce your respiration to two a minute, so as to make your body insensible to pain was that fiction?" A. "Purely imagination."

Judge—(Interrupting). "Counsellor, I will not allow you to go further in this line of inquiry. The witness himself says his article was almost entirely fiction, some of it founded upon fact. I will allow you the greatest latitude in a proper way, but not in this direction."

Counsel :—"Your honour does not catch the point."

Court :—"I do not think I do."

Counsel :—"This prosecution was started by a newspaper article written by the witness, and published in the morning Journal. It is the claim of the defence that the newspaper article was a mixture of fact and fiction, mostly fiction. The witness has already admitted that the history of his life, published but a few months ago, and written and signed by himself and sold as a history of his life, was a mixture of fact and fiction, mostly fiction. Would it not be instructive to the jury to learn from the lips of the witness himself how far he dressed up the pretended history of his own life, that they may draw from it some inference as to how far he has likewise dressed up the article which was the origin of this prosecution?"

Court :—"I shall grant you the greatest latitude in examination of the witness in regard to the newspaper article which he published in regard to this case, but I exclude all questions relating to the witness's newspaper history of his own life."

Counsel :—"Did you not have yourself photographed and published in the newspapers in connection with the history of your life, with your mouth and lips and ears sewed up while you were insensible to pain?"

Court :—"Question excluded."

Counsel :—"Did you not publish a picture of yourself in connection with the pretended history of your life, representing yourself upon a cross spiked hand and foot, but insensible to pain, in consequence of the instruction you had received from Professor Charcot?"

Court :—"Question excluded."

Counsel :—"I offer these pictures and articles in evidence."

Court :—(Roughly). "Excluded."

Counsel :—"In the article you published in the *New York Journal*, wherein you described the occurrences in the present case, which you have just now related upon the witness stand, did you there have yourself represented as in the position of the insane patient, with a sheet twisted around your neck, and held by the hands of the hospital nurse who was strangling you to death?"

Witness :—"I wrote the article, but I did not pose for the picture. The picture was posed for by some one else who looked like me"

Counsel : (Stepping up to the witness and handing him the newspaper article). "Are not these words under your picture. 'This is how I saw it done. Thomas J. Minnock,' a facsimile of your handwriting?"

A. "Yes sir, it is my handwriting"

Q. "Referring to the history of your life again how many imaginary articles on the subject have you written for the newspapers throughout the country?" A. One.

Q. "You have put several articles in New York papers, have you not?" A. "It was only the original story. It has since been re-dressed, that's all."

Q. "Each time you signed the article and sold it to the newspapers for money, did you not?" Court :—"Excluded."

Counsel :—(With a sudden change of manner, and in a loud voice, turning to the audience). "Is the chief of the police of Bridgeport, Connecticut, in the court-room? (Turning to the witness), Mr Minnock do you know this gentleman?" A. "I do."

Q. "Tell the jury when you first made his acquaintance."

A. "It was when I was arrested in the Atlantic Hotel, in Bridgeport, Connecticut with my wife."

Q. "Was she your wife at the time?" A. "Yes, sir."

Q. "She was but sixteen years old." A. "Seventeen, I guess."

Q. "You were arrested on the ground that you were trying to drug this sixteen-year-old girl and kidnap her to New York. Do you to deny it?" A. "I was arrested."

Q. (Sharply). "You know the cause of the arrest to be as I have stated? Answer yes or no." A. (Hesitating). "Yes, sir."

Q. "You were permitted by the prosecuting attorney, F. A. Barlatte, to be discharged without trial on your promise to leave the state, were you not?" A. "I don't remember anything of that."

Q. "Do you deny that?" A. "I do."

Q. "Did you have another young man with you upon that occasion?"

A. "I did. A college chum."

Q. "Was he also married to this sixteen-year-old girl?"

Witness gives no answer.

Q. "Was he married to this girl also?" A. "Why, no."

Q. "You say you were married to her. Give me the date of your marriage" A. (Hesitating) "I don't remember the date."

Q. "How many years ago was it?" A. "I don't remember."

Q. "How many years ago was it?" A. "I couldn't say."

Q. "What is your best memory as to how many years ago it was?"

A. "I can't recollect."

Q. "Try to recollect about when you were married."

A. "I was married twice, civil marriage and church marriage."

Q. "I am talking about Miss Sadie Cook. When were you married to Sadie Cook, and where is the marriage recorded?"

A. "I tell you I don't remember."

Q. "Try." A. "It might be five or six or seven or ten years ago."

Q. "Then you cannot tell within five years of the time when you were married, and you are now only twenty-five years old?"

A. "I cannot."

Q. "Were you married at fifteen years of age?"

A. "I don't think I was."

Q. "You know, do you not, that your marriage was several years after this arrest in Bridgeport that I have been speaking to you about?"

A. "I know nothing of the kind."

Q. (Resolutely). "Do you deny it?"

A. (Hesitating). "Well, no, I do not deny it."

Q. "I hand you now what purports to be the certificate of your marriage, three years ago. Is the date correct?"

A. "I never saw it before."

Q. "Does the certificate correctly state the time and place and circumstances of your marriage?" A. "I refuse to answer the question on the ground that it would incriminate my wife."

The theory on which the defence was being made was that the witness, Minnock, had manufactured the story which he had printed in the paper, and later swore to before the grand jury and at the trial. The effort in his cross-examination was to show that he was the kind of man who would manufacture such a story and sell it to the newspapers, and afterwards, when compelled to do so, swear to it in Court.

Counsel next called the witness's attention to many facts tending to show that he had been an eye-witness to adultery in divorce cases, and on both sides of them, first on one side, then on the other, in the same case, and that he had been at one time a private defective. The next interrogatories put to the witness developed the fact that, feigning insanity, he had allowed himself to be taken to Bellevue Hospital with the hope of being transferred to Ward's Island, with the intention of finally being discharged as cured, and then writing sensational newspaper articles regarding what he had seen while

an inmate of the public insane asylums ; that in Bellevue Hospital he had been detected as a malingerer by one of the attending physicians, Dr. Fitch, and had been taken before a Police Magistrate where he had stated in open Court that he had found everything in Bellevue " far better than he had expected to find it," and that he had " no complaint to make and nothing to criticise." The witness's mind was then taken from the main subject by questions concerning the various conversations had with the different nurses while in the asylum, all of which conversations he denied. The interrogatories were put in such a way so as to admit of a ' yes,' or, ' no,' answer only.

Gradually coming nearer to the point desired to be made, the following questions were asked :—

Q. " Did the nurse Gordon ask you why you were willing to submit to confinement as an insane patient, and did you reply that you were a newspaper man and under contract with a Sunday paper to write up the methods of the asylum, but that the paper had repudiated the contract ? "

A. " No."

Q. " Or words to that effect ? "      A. " No."

Q. " I am referring to a time subsequent to your discharge from the asylum, and after you had returned to take away your belongings. Did you, at that time, tell the nurse Gordon that you had expected to be able to write an article for which you could get £140 ? "      A. " I did not."

Q. " Did the nurse say to you, ' You got wooled this time, didn't you ? ' And did you reply, ' Yes, but I will try to write up something and see if I can't get square with them ! ' "      A. " I have no memory of it."

Q. " Or words to that effect ? "      A. " I did not."

Q. (Quietly). " At that time, as a matter of fact, did you know anything you could write about when you got back to the *Herald* office ? "

A. " I knew there was nothing to write."

Q. " Did you know at that time, or have any idea, what you would write when you got out ? "

A. " Did I at that time know ? Why I knew there was nothing to write."

Q. (Walking forward and pointing excitedly at the witness). " Although you had seen a man choked to death with a sheet on Wednesday night, you knew on Friday morning that there was nothing you could write about ? "

A. " I didn't know they had killed the man."

Q. " Although you had seen the patient fall unconscious several times to the floor after having been choked with the sheet twisted around his neck, you knew there was nothing to write about ? "

A. " I knew it was my duty to go and see the charity commissioner and tell him about that."

Q. " But you were a newspaper reporter in the asylum, for the purpose of writing up an article. Do you want to take back what you said a moment ago that you knew there was nothing to write about ? "

A. " Certainly not. I did not know the man was dead."

Q. " Did you not testify that the morning after you had seen the patient choked into unconsciouness, you heard the nurse call up the morgue to inquire if the autopsy had been made ? "

A. (Sheepishly). "Well, the story that I had the contact for with the Herald was cancelled."

Q. "Is it not a fact that within four hours of the time you were finally discharged from the hospital on Saturday afternoon, you read the newspaper account of the autopsy, and then immediately wrote your story of having seen this patient strangled to death and offered it for sale to the *New York World*?" A. "That is right; yes, sir."

Q. "You say you knew it was your duty to go to the charity commissioner and tell him what you had seen. Did you go to him?"

A. "No, not after I found out through reading the autopsy that the man was killed."

Q. "Instead, you went to the *World*, and offered them the story in which you describe the way Hilliard was killed?" A. "Yes."

Q. "And you did this within three or four hours of the time you read the newspaper account of the autopsy?" A. "Yes."

Q. "The editors of the *World* refused your story unless you would put it in the form of an affidavit, did they not?" A. "Yes."

Q. "Did you put it in the form of an affidavit?" A. "Yes."

Q. "And that was the very night that you were discharged from the hospital?" A. "Yes."

Q. "Every occurrence was then fresh in your mind, was it not?" A. "What?"

Q. "Were the occurrences of the hospital fresh in your mind at the time?" A. "Well, not any fresher than they are now."

Q. "As fresh as now?" A. "Yes, sir."

Q. (Pausing, looking among his papers, selecting one and walking up to the witness, handing it to him). "Take this affidavit, made that Friday night and sold to the *World*; show me where there is a word in it about Davis having strangled the Frenchman with a sheet, the way you have described it here to-day to this jury."

A. (Refusing the paper). "No, I don't think that it is there. It is not necessary for me to look it over."

Q. (Shouting). "Don't think! You know that it is not there, do you not?" A. "Yes sir, it is not there."

Q. "Had you forgotten it when you made that affidavit?" A. "Yes."

Q. (Loudly). "You had forgotten it, although only three days before you had seen a man strangled in your presence, with a sheet twisted around his throat, and had seen him fall lifeless upon the floor; you had forgotten it when you described the incident and made the affidavit about it to the *World*?" A. (Hesitating). "I made two affidavits. I believe that is in the second affidavit."

Q. "Answer my questions, Mr. Minnock. Is there any doubt that you had forgotten it when you made the first affidavit to the *World*?"

A. "I had forgotten it."

Q. (Abruptly). "When did you recollect?" A. "I recollected it when I made the second affidavit before the coroner."



Q. "And when did you make that?" A. "It was a few days afterwards, probably the next day or two."

Q. (Looking among his papers, and again walking up to the witness). "Please take the coroner's affidavit and point out to the jury where there is a word about a sheet having been used to strangle this man." A. "Well, it may not be there."

Q. "Is it there?" A. (Still refusing the paper). "I don't know."

Q. "Read it, read it carefully." A. (Reading). "I don't see anything about it."

Q. "Had you forgotten it at that time as well?"

A. (In confusion). "I certainly must have."

Q. "Do you want this jury to believe that, having witnessed this horrible scene which you have described, you immediately forgot it, and on two different occasions when you were narrating under oath what took place in that hospital, you forgot to mention it?" A. "It escaped my memory."

Q. "You have testified as a witness before in this case, have you not?" A. "Yes, sir."

Q. "Before the coroner?" A. "Yes, sir."

Q. "But this sheet incident escaped your memory then?" A. "It did not."

Q. (Taking in his hands the stenographer's minutes of the coroner's inquest). "Do you not recollect that you testified for two hours before the coroner without mentioning the sheet incident and were then excused and were then absent from the Court for several days before you returned and gave the details of the sheet incident?" A. "Yes, sir, that is correct."

Q. "Why did you not give an account of the sheet incident on the first day of your testimony?" A. "Well, it escaped my memory; I forgot it."

Q. "Do you recollect, before beginning your testimony before the coroner, you asked to look at the affidavit that you had made for the *World*?"

A. "Yes, I had been sick, and I wanted to refresh my memory."

Q. "Do you mean that this scene that you have described so glibly to-day had faded out of your mind then, and you wanted your affidavit to refresh your recollection?" A. "No, it had not faded, I merely wanted to refresh my recollection."

Q. "Was it not rather that you had made up the story in your affidavit, and you wanted the affidavit to refresh your recollection as to the story you had manufactured?" A. "No, sir, that is not true."

The purpose of these questions, and the use made of the answers upon the argument, is shown by the following extract from the summing up:—"My point is this, gentlemen of the jury, and it is an unanswerable one in my judgment, Mr. District Attorney: If Minnock, fresh from the asylum, forgot this sheet incident when he went to sell his first newspaper article to the *World*; if he also forgot it when he went to the coroner two days afterwards to make his second affidavit; if he still forgot it two weeks later when, at the inquest, he testified for two hours, without mentioning it, and only

first recollected it when he was recalled two days afterwards, then there is but one inference to be drawn, and that is, *that he never saw it, because he could not forget it if he had ever seen it!* And the important feature is this; he was a newspaper reporter; he was there, as the district attorney says, 'to observe what was going on.' He says that he stood by in that part of the room, pretending to take away the dishes in order to see what was going on. He was sane, and the only sane man there. Now if it did take place, the insane man called here as witnesses could not have seen it. Do you see the point? "Can you answer it? Let me put it again. It is not in mortal mind to believe that this man could have seen such a transaction as he describes and ever have forgotten it. Forget it when he writes his article the night he leaves the asylum and sells it to the morning *World*! Forget it two days afterwards when he makes a second important affidavit! He makes still another statement, and does not mention it, and even testifies at the coroner's inquest two weeks later, and leaves it out. Can the human mind draw any other inference from these facts than that he never saw it—because he could not have forgotten it if he had never seen it? If he never saw it, it did not take place. He was on the spot, some, and watching everything that went on, *for the purpose of reporting it.* Now if this sheet incident did not take place the insane men could not have seen it. This disposes not only of Minnock, but of all the testimony in the people's case. In order to say by your verdict that that sheet incident took place, you have got to find something that is contrary to all human experience; that is, that this man, Minnock, having seen the horrible strangling with the sheet, as he described, could possibly have immediately forgotten it."

The contents of the two affidavits made to the *World* and the coroner were next taken up, and the witness was first asked what the occurrence really was as he now remembered it. After comparing his answers, with his affidavits, and upon the difference being made apparent, he was asked whether what he then swore to, or what he now swore to, was the actual fact; and if he was now testifying from what he remembered to have seen, or if he was trying to remember the facts as he made them up in the affidavit. The cross-examination continued as follows:—

Q. "What was the condition of the Frenchman at supper time? Was he as gay and chipper as when as you said that he had warmed-up after he had been walking around awhile?" A. "Yes, sir."

Q. "But in your affidavit you state that he seemed to be very feeble at supper. Is that true?" A. "Well, yes; he did seem to be feeble."

Q. "But you said a moment ago that he warmed up and was all right at supper time." A. "Oh, you just led me into that."

Q. "Well, I won't lead you into anything more. Tell up how he walked to the table." A. "Well, slowly."

Q. "Do you remember what you said in the affidavit?" A. "I certainly do."

Q. "What did you say?" A. "I said he walked in a feeble condition."

Q. "Are you sure that you said nothing in the affidavit about how he walked at all?" A. "I am not sure."

Q. "The sheet incident, which you have described so graphically, occurred at what hour on Wednesday afternoon?" A. "About six o'clock."

Q. "Previous to that time, during at the afternoon, had there been any violence shown towards him?"

A. "Yes; he was shoved down several times by the nurses."

Q. "You mean they let him fall?" A. "Yes, they thought it a very sunny thing to let him totter backward, and to fall down. They then picked him up. His knees seemed to be kind of muscle-bound, and he tottered back and fell, and they laughed. This was some time about three o'clock in the afternoon."

Q. "How many times, Mr. Minnock, would you swear that you saw him fall over backward, and after being picked up by the nurse, let fall again?" A. "Four or five times during the afternoon."

Q. "And would he always fall backward?" A. "Yes, sir; he repeated the operation of tottering backward. He would totter about five feet, and would lose his balance and would fall over backward."

The witness was led on to describe in detail this process of holding up the patient, and allowing him to fall backward, and then picking him up again, in order to make the contrast more apparent with what he had said on previous occasions and had evidently forgotten.

A. "I now read to you from the stenographer's minuter what you said on this subject in your sworn testimony given at the coroner's inquest. You were asked. 'Was there any violence inflicted on Wednesday before dinner time?' And you answered, 'I didn't see any.' You were then asked if, up to dinner time at six o'clock on Wednesday night, there had been any violence; and you answered. 'No, sir; no violence since Tuesday night. There was nothing happened until Wednesday at supper time, somewhere about six o'clock.' Now what have you to say as to these different statements, both given under oath, one given at the coroner's inquest, and the other given here to-day?"

A. "Well, what I said about violence may have been omitted by the coroner's stenographer."

Q. "But did you swear to the answers that I have just read to you before the coroner?"

A. "I may have, and I may not have. I don't know."

Q. "If you swore before the coroner there was no violence, and nothing happened until Wednesday after supper, did you mean to say it?"

A. "I don't remember."

Q. "After hearing read what you swore to at the coroner's inquest, do you still maintain the truth of what you have sworn to at this trial, as to seeing the nurse let the patient fall backward four or five times, and pick him up and laugh at him?" A. "I certainly do."

Q. "I again read you from the coroner's minutes a question asked you by the coroner himself. Question by the coroner: 'Did you at any time while in the office or the large room of the asylum see Hilliard fall or stumble?' Answer: 'No, sir; I never did.' What have you to say to that?" A. "That is correct."

Q. "Then what becomes of your statement made to the jury but fifteen minutes ago, that you say him totter and fall backward several times?"

A. "It was brought out later on before the coroner."

Q. "Brought out later on? Let me read to you the next question

put to you before the coroner. Question: 'Did you at any time see him try to walk or run away and fall?' Answer: "No, I never saw him fall." What have you to say to that?" A. "Well, I must have put in about the tottering in my affidavit, and omitted it later before the coroner."

Judge:—"Let me caution you, Mr. Minnock, once for all, you are here to answer counsel's questions. If you can't answer them, say so; and if you can answer them, do so; and if you have no recollection, say so."

Witness:—"Well, your Honour, Mr.—has been cross-examining me very severely about my wife, which he has no right to do."

Judge:—"You have no right to bring that up. He has a perfect right to cross-examine you."

Witness:—(Losing his temper completely). "That man wouldn't dare to ask me those questions outside. He knows that he is under the protection of the Court, or I would break his neck"

Judge:—"You are making a poor exhibit of yourself. Answer the questions, sir,"

Q. "You don't seem to have any memory at all about the transaction. Are you testifying from memory as to what you saw, or making up as you go along?" No answer.

Q. "Which is it?" A. (Doggedly). "I am telling what I saw."

Q. "Well, listen to this then. You said in your affidavit: The blood was all over the floor. It was covered with Hilliard's blood, and the scrub woman came on Tuesday and Wednesday morning, and washed the blood away.' Is that right?" A. "Yes, sir."

Q. "Why, I understood you to say that you didn't get up on Wednesday morning until noon. How could you see the scrub woman wash the blood away?" A. "They were at the farther end of the hall. They washed the whole pavilion. I didn't see them Wednesday morning; it was Tuesday morning I saw them scrubbing."

Q. "You seem to have forgotten that Hilliard, the deceased, did not arrive at the pavilion until Tuesday afternoon at four o'clock, what have you to say to that?"

A. "Well, there were other people who got beatings beside him."

Q. "Then that is what you meant to refer to in your affidavit, when speaking of Hilliard's blood upon the floor. You meant beatings of other people?" A. "Yes, sir—on Tuesday."

The witness was then forced to testify to minor details, which, within the knowledge of the defence, could be contradicted by a dozen disinterested witnesses. Such, for instance, as hearing the nurse Davis call up the morgue, the morning after Hilliard was killed, at least a dozen times on the telephone, and anxiously inquire what had been disclosed by the autopsy; whereas, in fact, there was no direct telephonic communication whatever between the morgue and the insane pavilion; and the morgue attendants were prepared to swear that no one had called them up concerning the Hilliard autopsy, and that there were no inquiries from any source.

By this time the witness had begun to flounder helplessly. He contradicted himself constantly, became red and pale by turns, hesitated before each answer, at times corrected his answers, at others was silent and made

no answer at all. At the expiration of four hours he left the witness-stand a thoroughly discredited, haggard, and wretched object. See Wellman, pp. 326—349.

## CHAPTER 93

### Of Party as Witness

S. 120, Evidence Act, lays down that, "In all the civil proceedings the parties to the suit and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness."

In England, up to the middle of the 19th century, parties to a civil proceedings, were in accordance with the maxim of Civil Law, *Nemo in propria testis esse debet*, i.e., no one can be a witness in one's own cause, deemed to be incompetent to testify. This rule was founded solely on the interest which the parties to the suit were supposed to have in the event of it. Gilb, Ev., 4th Ed. 130. But this disability was removed by Legislation. See (1846) 9 and 10 Vict. C. 95, S. 83.

In dealing with a party to the suit as a witness, you have this advantage, that his testimony will be watched with more strictness and subjected to a severer scrutiny, than would the evidence of an unbiased witness. If the advocate is satisfied that the witness is lying, he should involve him in a maze of contradictions, which it is almost impossible for the most skilful liar to avoid, because to quickest mind cannot in a moment calculate the effect of its present answer upon the past, or anticipate the bearing of the reply it is the about to give upon the questions that are to follow. Hence it is that cross-examination has always been deemed the surest test of truth, and a better security than the oath. See Wrottesley on the Examination of Witnesses, II Ed., pp. 143—144. There is no rule that if a party, plaintiff or defendant, gives his testimony, he must be disbelieved, because he is a party to the suit. When a party has deposed in support of his case, his evidence must be scrutinized in the same manner as that of any other witness, 49 C. 345. In several important decisions, the Privy Council has emphasised the necessity of a party, who has a personal knowledge of the case, going into the witness-box to dispel the suspicion which would otherwise attach to his case; and, acting upon this rule, the Courts in India have repeatedly held that where a party, whose evidence is material, does not go into the witness-box, the Court should presume against him. See 1934 L. 63, 1927 P. C. 230.

### In Divorce Cases

In a petition by a wife for the dissolution of her marriage on the ground of adultery coupled with cruelty or desertion, the husband and wife are not only competent witnesses, but are compellable to give evidence of, or relating to, such cruelty or desertion. It must, however, be remarked that they are competent and compellable only as to the cruelty or desertion, and not as to adultery, and that this rule applies only in a suit by the wife against the husband for dissolution of marriage on the ground of adultery with cruelty or with desertion. In all other proceedings under the Divorce Act, the parties are competent witnesses, but not compellable unless the "offer" their testimony. See Ss. 51—52, Divorce Act, IV of 1869,

4 A. 49. Whatever might be the English Common Law on the subject, in India the parties to proceedings of divorce are competent to give evidence as to non-access and the consequent illegitimacy of the child. See 38 M. 466.

## CHAPTER 94

### Of Police Officer

A police officer is very difficult witness to cross-examine. In order that a police officer should be cross-examined effectively, the defence counsel should prepare himself with all the details and the steps taken in investigation by the said police officer. The police officer generally identifies himself with the case as if it is his personal one. Therefore it is risky to question him in a haphazard manner unless you know that he can be caught in the net. The testimony against a prisoner as *policemen, constables*, and others employed in the suppression and detection of crime, should usually be watched with care; not because they intentionally prevert the truth, but because their professional zeal, fed as it is by an habitual intercourse with the vicious almost necessarily leads them to ascribe all actions to the worst motives, and to give a colouring of guilt to facts and conversations which, in themselves are consistent with perfect rectitude. The creed of the police is naturally apt to be that all men are guilty, till they are proved to be innocent." (See Taylor, S. 57) In the first Report of the Indian Law Commissioners it was stated that "the evidence taken by the Parliamentary Committee on Indian Affairs during the Sessions in 1852 and 1853, and other papers which have been brought to our notice, abundantly show that the powers of the police are often abused for purposes of extortion and oppression."

Harris in "Hints on Advocacy," 14th Ed., pp. 104—105 regarding police witnesses says: "They are dangerous persons. They are *professional witnesses*, and in a sense that no other class of witnesses can be said to be so. Their answers generally may be said to be stereotyped. Don't imagine that you are going to trip him up upon the part where his beat has been for many a years. He will perceive you coming while you are a long way off, and in all probability go out and meet you. Perhaps before you were born he answered the question you have just put. But try him with somethings just as little out of common line by way of experiment. You see he looks at you as though you have got the sun in his eyes. He cannot quite see what you are about. And you must keep him with the sun in his eyes if you desire to make anything of him. Without accusing him even by implication of having no reverence for the sanctity of an oath I must say, that if he sees the drift of your questions, the chances are against your getting the answers you want, or in the form in which you would like them. He thinks it his duty to baffle you and if you do not get an answer you don't want, it will probably be because the policeman is as young and inexperienced as you are. To be effective with the policeman your questions must be rapidly put. Although he has a trained mind for the witness-box, it is trained in a very narrow groove; it moves as he himself moves, slowly and ponderously along its particular beat, it travels slowly because of its discipline, and is by no means able to keep pace with your or ought not to be. You should not permit him to trace the connection between one question and another when you desire that he should not do so."

Unless certain of the answer, never under any circumstances ask a

policeman as to character. The highest character he can give a respectable person will be that he "does not know anything against him." Furthermore, it is dangerous to put 'fishing' questions to this class of witness. The police constable is not below human nature generally. The parent of many of his faults is the fact that subordinate judges as a rule, think he must be protected by an *implicit belief* in his veracity. As a natural consequence he falls into the error of believing in his own infallibility. Harris, p. 107 "In criminal cases, the most dangerous witness an advocate for the defence has to meet, is the police Sub-Inspector. What a familiar figure in Indian Courts, with his uniform, his little round forage cap, with the chin strap round his ears. He advances with a salute and forthwith begins to arrange his slip of Bally paper containing the first information or his notes. He is probably aware that your clients have obtained complete copies of all his notes, and the Police diaries. He may even have assisted for a consideration in placing them at their disposal. Yet he is prepared and not with assumed, but real downhearted earnestness to defend the sanctity of those very diaries and papers. He is never friendly to the accused in Court, for even though he has been bribed beforehand, and though his tendency was to favour the accused yet on coming into Court he cannot be more than lukewarm. As a rule, however he is hostile. He looks upon it as a sort of personal combat between himself and the advocate or pleader for the accused. He is a power in the land much feared and with a reputation for cunning. To allow himself to be outwitted would mean disgrace in the eyes of his subordinates and the public. He therefore says in one quite glance: "see how much you can get out of me." Owing to the system in vogue, too, in this country, where the Magistrate is frequently the head of the Police and possibly has directed and followed out the investigation against the accused step by step, the Court is as a rule, inclined to place the utmost reliance and confidence in the sub-inspector. He needs very cautious handling; for if hostile he will, in his answers try to introduce matter of a damaging nature and having probably been subjected to cross-examination times without number, he knows how to do it successfully, as part of his legitimate answer to questions. A rapid and minute examination on details upon which he may be unprepared will be the safest plan to be adopted especially upon matters bordering on, or connected with, those portions of his evidence, in which one's instructions or one's instinct, lead one to believe there have been delinquencies on his part. A fear of underhand or illegal doings being disclosed or brought to light may tend to put him in a flutter; and to this, a real or assumed air of having some dangerous knowledge, or information, will be of assistance, if coupled with fineness. Should such a witness evince an attempt to escape a point that is pressed in a manner that shows his desire to conceal his attempt to do so, he should be brought up sharply and the point should be pressed home. From such a witness the truth must be wrung and extorted; if treated affably, he would probably deceive his examiner by pretending to fall in with him. If flattered, he would probably be on his guard, however skilfully it were applied, for he is a man of experience. As likely as not, his dealings during the course of his enquiries will not bear a very close investigation and being bound by his official rules to observe a certain methods as regards the times of his enquiries, and the mode of entering the result of them from time to time, in his diaries, an attack upon these points may lay him under fear of exposure. His attempt to guard himself securely and on all points, will probably then be carried to extremes, and on his finding himself reduced to an untenable position, he may lose his head, and thus afford a suitable opportunity for an effectual breach being made in the ramparts of his evidence. He may also be laid by the heels by being

allowed to exaggerate upon any particular point but it should be perfectly certain that the matter chosen for his mental excursions was either admitted ground or such as even if proved by the other side, could not do one much harm, in any event, his bias and hostility would be made patent. But whatever line you take, remember that the Magistrate usually has a strong bias in favour of the impeccability of the sub-inspector and that this strange confidence extends down to the constable. The Judge however generally has a more open mind on this question, a fact that would seem to indicate that a Magistrate is liable to be unconsciously biased in favour of the honesty of his subordinate police. It must be remembered if with some astonishment that Mofussil Magistrates regard this local sub-inspectors of Police as *doli incapax*.

With this class of witness, as with every other, the chief rules to remember are not to cross-examine too far on any point and if possible never to cross-examine minutely upon any point upon which any other witnesses have been cross-examined. The latter remark is of particular applicability where the witnesses previously cross-examined gave their evidence on a previous day for they are certain to have discussed the subject fully, and to have come prepared to give those after thoughts that so unhappily occurs to person when too late." Morrison on Advocacy pp. 141—143.

#### Value of his Evidence

Many Policemen learn their evidence and give it off verbatim; yet it is more often than not substantially true. But you will gather from the witness's manner, his mode of answering, his look, tone, language, gestures, even his very glances, whether he be a false witness or one who is telling a story partly true and partly false, the most difficult of all witnesses to deal with Harris' Hints on Advocacy, Fourteenth Ed., 199, p. 50.

To discredit the witness merely because he is Policeman is impossible. 3 Lahore. 144. A Policeman's testimony, like that of every other witness must be judged on its own merit and should be accepted or rejected according to the circumstances of each case. 1930 L. 892 : 31 P. L. R. 688, 1935 A. 850 : 158 I. C. 424. Statements of high government officials should be considered like the statements of other witnesses. Court should not surrender its judgment to such officers. 1935 Sind 223.

#### Illustrations

(i) This was a cross-examination of an intelligent Police constable.

Q. "Had you any reason constable, for arresting the prisoner as you did for suspecting him, in fact?"

That was the straightforward way of putting it. Judge likes straightforwardness. Jury admires the young counsel's jaunty manner, and the police constable likes to be dealt with without any attempt to circumvent him. But that is a very dangerous question for the accused. It would cost him his liberty.

Q. "Why did you suspect him?" asked the counsel.

A. "I know he was one of the worst thieves we got."

Mark the impression that the question and the answer should have made upon the jury. How any answer to such a question would benefit the accused, it is impossible to know. See Harris' Hints on Advocacy, Introduction, xii-xiii.

(ii) In an American case, a police officer testified that, in his belief, a boy complained of for a minor offence was insane.



Q. "You mean he is *non-compes mentis*?" asked the Magistrate.

A. "I don't believe I understand," said the policeman.

Q. "What! You don't know what *non-compes mentis* means? How long have you been in the police force?"

A. "Twenty-five years."

Q. "A detective twenty-five years, and don't know what *non-compes mentis* means?"

A. "Yes; if I understood that language I would not be a policeman," was the witness's retort. 16 M. L. J. 127.

(iii) A Police Officer testified with complete truthfulness to the occurrence which he had witnessed. The lawyer was not satisfied with the evidence but imagined that it was his duty towards his client to cross-examine him severely. To his dismay he found the following answers to his questions.

Q. What did you see when you arrested the prisoner. I said, "now see her, punk when you got out of the stir last time you told me you would lay off of striping the car but here you are again." Had the lawyer been content with the original testimony given by the Police Officer he would have landed his client in a more miserable position. By his blunder he only succeeded in making his client a "doubled-dyed deceiver".

(iv) A woman Sally by name was charged of an indecent exposure at the Chicago theatre. The Counsel for the accused succeeded in getting the full description of the fan used in the dance. His object was to show that she had provided herself with a covering sufficient to prevent her private parts from being seen by the gaping audience. The Counsel unnecessarily put a question to the Police Officer which ended the case of his client.

Q. Did you ever see this fan at all at that performance? A. Yes. I did. In the Court room of Judge Hasten when she was convicted of the same charge. An objection was raised to the answer given by the witness as uncalled for statement. The Judges instructed the Jury to disregard the statement but the damage had been done and the fact of previous conviction on a similar charge which could otherwise not have been proved in a court of law, was paraded before the Jury and which resulted in her conviction.

(v) The question was whether the handwriting on the cheque was the same as that of the Accused. The prosecution called a witness who swore positively that the cheque bore the defendant's name and signature. The Counsel asked the witness question in the cross-examination as follows:—

Q. Did you ever see the defendant write? A. When I was Sheriff's Officer, I arrested him several times and I have seen him write his own bail bond over and over again.

Thus the accused's bad character was paraded before the Jury because of his own lawyer's inaptness. Generally speaking the lawyers are in the habit of asking too much. In the case of Police Officers, the golden rule is to ask as little as possible unless you have in your possession irrefutable facts which you can prove to impeach his credit. Rufus Choate gave a very sound advice when he said: "Never cross-examine any more than

is necessary absolutely. If you do not break the witness he breaks you for he repeats over in stronger language to the Jury his story"

(vi) About two decades back I had to cross-examine a Sub-Inspector of police in a theft case, who was a bit arrogant and stiff necked. The charge against the accused was that he committed theft of fodder from the well of the complainant which was situate at a distance of about half a mile from the village of the complainant. His story was that the accused were arrested but on hue and cry being raised, friends and the relations of the accused who resided in the village B came upon the scene of occurrence and rescued them. The village of the accused was at a distance of one mile from the well, lying in the same direction as the village of the complainant. My theory was that if hue and cry was actually raised it was more probably that the relations of the complaint should have reached the spot earlier than the accused's friends. Moreover I held the strong opinion that the distance being over a mile it was not likely that the friends of the accused could have known that the accused were in trouble. The Sub-Inspector gave the testimony regarding the various steps in investigation and deposed that he visited the village of the complainant as well as the scene of occurrence. The cross-examination was as follows :—

Q. What is the distance between the scene of the crime and the village of the complainant. A. I do not know.

Q. What is the distance between the place of occurrence and the village of the accused. A. I do not know. You may ask anything else.

I perceived that his tone was defiant and he was determined to say "I do not know" to every question I would put.

Q. Can you say whether the distance between the place of the occurrence and that of the village of the complainant was about a mile. A. I do not know.

Q. Half a mile. A. I do not know.

Q. Two miles. A. I do not know.

Q. 500 yards. A. I do not know.

Q. 200 yards. A. I do not know.

At this stage the witness defiantly stated that this answer be the same whatever the questions may be.

Q. Is the distance more than 10 yards, or less, Mind you if you say I do not know I will see that you are handcuffed and prosecuted for perjury. At this admonition the Sub-Inspector lowered his voice and said it was more than 10 yards.

Q. Do you see the swimming bath which is outside the Court-room. A. Yes.

Q. Now tell me whether the distance was more than that of the swimming bath from this place. A. It was much more.

Q. Do you know that the distance of the swimming bath from this place is about 500 yards. A. Yes.

Q. Then I take it that the distance of the scene of occurrence from the village of the complainant was about 700 or 800 yards or approximately half a mile. A. Yes.

Q. Now tell me when you first gave the answer that you do not know the distance, was it due to your foolishness or was it intentional just to keep back the evidence from the Court. To which there was no answer.

Thus the impression left by the witness in Court was not very happy and he was disbelieved on some other points as well.

(vii) In another case the police deposed that he visited the scene of occurrence on a particular date. From the manner of giving evidence I sensed that he could not have gone to the place in the month of June at 2 p. m. and must be taking rest under some shady tree. It was common ground that the injured persons of both sides were taken to a small village which was at a distance of 100 yards from the scene of occurrence. He was cross-examined thus :—

Q. Did you any village near the place on any side.

A. No. There was no village for half a mile all round.

This collapsed the case for the prosecution.

## CHAPTER 95

### Of Prosecution Witnesses Called by Defence

The general rule is that if a prosecution witness is called by the defence as defence witness, the character of the witness is not changed, and he can be cross-examined by the defence.

On the Magistrate refusing to re-summon prosecution witnesses for cross-examination, the accused cited them as defence witnesses. Held, that accused had right to cross-examine them, as it did not change their character. 28 C. 594, 1 C. W. N. 19, 1922 M. W. N. 120. A witness mentioned by prosecution but not examined must still be regarded for all practical purposes as prosecution witness, even if examined by the defence. 71 P. L. R. 1910. If the accused did not cross-examine the witnesses as he could not get copies of statements, and cited them as defence witnesses, Court cannot refuse to recall them. 1931 L. 180 : 134 I. C. 580 : 32 Cr. L. J. 202. Prosecution witness, if present, can be allowed to be cross-examined at defence stage. 1932 N. 137 (1) : 55 Cr. L. J. 940 : 140 I. C. 117.

The following judgment of Ameer Ali and Pratt JJ. is reproduced from 28 C. 594, as it is very important and fully illustrates the above rule :—

The accused were tried by the Sub-Divisional Officer of Begusarai under S. 147 of the Penal Code. During the trial after the witnesses for the prosecution had been examined, the accused made an application for an adjournment so as to enable them to cross-examine by Counsel, who could not appear on the particular day fixed. The application was refused, and the accused were called upon to cross-examine the witnesses themselves, which they were not in a position to do. Subsequently, the 20th of December 1900, was fixed for taking the evidence for the defence, and the accused applied that the prosecution witnesses should be summoned, and they be allowed to examine them. The witnesses were summoned, and, when the counsel for the accused proceeded to cross-examine them, he was not allowed to do so. The accused were convicted and sentenced, and their appeal was dismissed by the Sessions Judge of Bhagalpur on the 29th January, 1901.

The accused thereupon applied to the High Court and obtained a Rule calling upon the Magistrate of the District to show cause why the conviction and sentence should not be set aside on the ground that the

accused were not allowed by the Sub-Divisional Officer of Beguserai to cross-examine the witnesses for the prosecution, who were summoned on the 20th of December and who were present on that date.

The judgment of the Court (Ameer Ali and Pratt. JJ) is as follows:—

This rule was issued calling upon the Magistrate of the District to show cause why the conviction of, and sentence passed on, the petitioners should not be set aside on the ground that the accused were not allowed by the Sub-Divisional Officer of Beguserai to cross-examine the witnesses for the prosecution, who were summoned for the 20th December, and who were present on that date, or why such other order should not be made, as to this Court may appear fit and proper.

As we pointed out to the learned Advocate-General in the course of his argument, in granting the Rule we had in view the provisions of S 257. We may observe at the very outset that, in our opinion, the work of this Court would be appreciably lightened, if the Subordinate Magistrates in dealing with the law relating to the rights of accused persons, would contrive it in a less technical spirit than they are sometimes accustomed to do. In the inferior Courts the right principle is occasionally reversed, and a person is presumed to be guilty the moment he is accused, and every attempt on his part to prove his innocence is regarded as vexatious. When the law vests in a Court a certain discretion, that discretion in our opinion, should be exercised, so as not to give rise to any reasonable complaint of prejudice or bias.

What appears to have happened in this case is as follows:—The witnesses for the prosecution were examined, and an application was made on behalf of the accused for an adjournment, so as to enable them to cross-examine by Counsel, who could not appear on the particular day fixed. That application was refused, and the accused were called upon to cross-examine the witnesses themselves, which they were not in a position to do. Subsequently a day was fixed for taking the evidence for the defence, and the accused asked that the prosecution witnesses, who had been already examined, but whom they had had no opportunity to cross-examine, except as already mentioned, should be summoned, and then be allowed to examine them. Those witnesses were summoned by the Sub-Divisional Officer, and, when the counsel for the accused proceeded to cross-examine them as naturally he would, considering that they had deposed for the prosecution, in other words to put to them questions, which ordinarily would not be put to the witnesses for the defence, he was admittedly not allowed to do so. The reason given in the explanation as well as in the note of the Magistrate attached to the judgment is, that the witnesses had been cited as defence witnesses, and, as no sufficient reason was made out under S 154 of the Evidence Act, it was within the Magistrate's discretion to disallow cross-examination. In our opinion the mere fact that the accused had, under the circumstances already stated, been compelled to treat the witnesses for the prosecution as their own witnesses, does not change their character. The accused sought for an opportunity to cross-examine them; that was not allowed. They considered that, in cross-examination, they would be in a position to elicit facts, which would materially help their case. Under the circumstances we think that, although the accused were compelled to obtain their attendance as witnesses for the defence,

they were really summoned under S. 257 "for the purpose of cross-examination," and we, therefore, think the Magistrate was wrong in refusing to allow their cross-examination. To regard it otherwise would be to make the procedure of the Courts a mere travesty of justice. Under these circumstances we are of opinion that the Rule ought to be made absolute, and we accordingly make it absolute and set aside the conviction and sentences.

## CHAPTER 96

### Of Servant as Witness

The testimony of employees of a party is of course open to the criticism "that they would naturally testify, as far as they possibly could, in favour of their employers." 88 N. Y. Supp. 477, 483. See 1922 Pat. 88.

No man is an absolutely disinterested witness where his testimony relates to the question of the performance or non-performance of a duty which he owed on account of the position which he occupied. 23 U. S. Sup. Ct. Rep. 585. If the servant is not in the employ of the party when he testifies, his testimony is not, it seems, regarded as that of a biased witness. 82 N. Y. Supp. 1-4. "Servant might naturally be actuated by a desire to shield themselves from blame in having carelessly started machinery under such circumstances as to maim a fellow-workman for life, even if they are no longer in the employment of the master who is sued for the injury. 58 N. Y. Supp. 640-642. It is a matter of familiar experience in actions for injuries arising from negligence, that witnesses charged with the performance of certain duties, to the omission of which the accident is attributed, seldom admit that there was any negligence on their part, but generally testify that everything was done by them that ought to have been done, 8 Daly (N. Y.) 231. When an employee is testifying, it may be shown that his employer is interested in the prosecution. 100 Ala. 144, 14 So. Rep. 409-411.

## CHAPTER 97

### Of Tutored Witnesses

More often witnesses are produced in law Courts who have learned their testimony by heart although they were not present at the scene of the occurrence. Such witnesses are called tutored witnesses. They can be detected by two means: Firstly by putting a volley of questions rapidly so that they be confused as to their narration they have learnt by heart. The thread of the cross-examination should be taken up from the middle of the story or somewhere towards the end and the questions should be put to them in reverse order: Secondly they may be effectively cross-examined with regard to some collateral matters which they cannot easily answer because they have got to fall back at their own invention, thus their testimony can be broken down.

"If witness is repeating by a rote a lesson which he has committed to memory, you will find wanting in him all or most of the signs of truth above described. He stands quite still excepting, it may be, for an uneasy motion of the hands or feet. His face has no meaning in it. His eyes are fixed not upon the counsel, the Judge or the jury, but upon the wall or more commonly

turned upwards, with a sort of vacant stare. His voice is monotonous, and expresses no emotion. His delivery is rapid, unless when seized by a sudden forgetfulness, when he makes a full stop, or after stumbling a little, tries back again in hope to regain the last word or thought. His language also is almost always inappropriate to his position, for in such a case, it would seldom be his own composition that he had learned, but something which another has put into words, which words would not be those of the pupil, but of the master. A single expression will often suffice to betray to you this sort of taught testimony, when it is one which you know such a person at the witness would not have used, and perhaps there is no test so difficult to evade, and so conclusively where it prevails, as this of language. The reason is plain. A witness learns his lesson thus: He tells what he knows to the attorney of his clerk. If they be of the unscrupulous class, which has happily become so rare, the witness is informed that his evidence is of no use, but that if he had known so and so, he would have been taken to the assizes. The hint suffices. The memory is racked again, and the testimony desired is then found. It is taken down in writing. His entire story is put into formal shape, it is read over to him again, until he has it almost by heart. He learns not merely the facts he is to prove, but they very words in which those facts are narrated in the brief and he repeats them as he has learned them. "Having thus satisfied yourself of the fact that he is lying, you may, in your cross-examination, endeavour to discredit the witness with the jury. Your attack may be most successfully conducted thus: "Without previous questioning come at once to the point, ask him to repeat his account of the transaction. He will do so in almost the self-same words with the same aspect and manner, and in the same tone and language, before and after the episode. So certain is this that, if it fails, you may fairly suppose that whatever other objections may be offered to the testimony, it is not a story repeated by rote." Cox's Advocate.

"Have your eyes always on the witness. Occasionally witness lets fall some expression, some phrase, some idea which you do not expect from him. Be watchful of it, and if you can turn it to some good purpose do not lose it." 13 Cr. L. J. p. 110.

In order to elicit truth, and excellent plan is to take the witness through his story but not in the same order of incidents in which he told it. Dislocate his train of ideas, and you put him out: you disturb his memory of his lesson. Thus begin your cross-examination at the middle of his narrative, then jump to one end, then to some other part the most remote from the subject of the previous question. If he is telling the truth, this will not confuse him, because he speaks from impressions upon his mind; but if he is lying, he will be perplexed and will betray himself, for speaking from the memory only, which acts by association, you disturb that association, and his invention breaks down. "When you are satisfied that the witness is drawing upon his invention, there is no more certain process of detection than a rapid fire of questions. Give him no pause between them; no breathing place, nor point to rally. Few minds are sufficiently self-possessed as, under such a catechising, to maintain a consistent story. If there be a pause or a hesitation in the answer, you thereby lay bare the falsehood. The witness is conscious that he dares not to stop to think whether the answer he is about to give will be consistent with the answers already given, and he is betrayed by his contradictions. In this process it is necessary to fix him to time, and place, and names. 'You heard him say so?' 'When?' 'Where?' 'Who was present?' 'Name them.' 'Name one of them.'

Such a string of questions, following one upon the other as fast the answer is given, will frequently confound the most audacious. Fit names, and times and places, are not readily invented, or if invented, not readily remembered. Nor does the objection apply to this that may undoubtedly be urged against some others of the arts by which an advocate detects falsehood, namely, that it is liable to perplex the innocent, as well as to confound the guilty; for if the tale be true, the answers to such questions present themselves instantaneously to the witness's lips. They are so associated in his mind with the main fact to which he is speaking, that it is impossible to recall the one without the other. Collateral circumstances may be forgotten by the most truthful, or even be unobserved; but time, place, and audience are a part of the transaction, without which memory of the fact itself can scarcely exist." See Wrottesley on the Examination of Witnesses, 11 Ed., pp. 128-131.

"Your care will be to distinguish between the witness who from this cause runs through his story, and the witness who does so because he is repeating a lesson learned by rote. Close observation will enable you to discover a difference in the look, the tone, the manner, and the language. When relating what he has seen, there is always an aspect of intelligence, even in the dullest, the eye kindles, the face brightens, the expression changes with the incidents narrated. Still more does the tone of the voice reveal the speaker's truth; its changes are dramatic; it varies with every emotion that flashes across the mind, awakened by the recalling of the incidents described. The manner is usually eager and energetic, and in strict accordance with the tones, the aspect, and the theme. And even if these signs should be wanting you must not, therefore, decide against the veracity of the witness until you have considered his language. If he is honest, his language will always be such as is consistent with his condition of life, appropriate to age, sex, education, and calling. Moreover, it will exhibit that fitness for the subject without perference to structure of sentences which always distinguishes *extempore* narrative. If these characteristics, or either of them, be present, you may safely assume that the witness is telling the truth, but that he is only able to do so after his own fashion of a continuous story, and cannot recall it by scraps, under interrogation."

The following decision will establish the observations quoted above:—The fact that a witness makes mistake in identification is a strong evidence that he has not been tutored by the police. 45 A. 300. When the identifying marks are told by police to the witness the identification is valueless. 1928 L. 724; 110 I. C. 329; 29 P. L. R. 388. Where the corroborative evidence of an approver consists of his son who parrot-like repeats what he is tutored to say, it is not sufficient. 1929 L. 587; 122 I. C. 91. If the statement of a witness was recoded by police after a lapse of time, his evidence should be discarded inasmuch as there was sufficient time and opportunity for his being tutored. 1922 P. 348; 67 I. C. 581; 23 Cr. L. J. 421. Accused admitted having prejudured themselves to incriminate a person of murder, because they had been tutored by police, the defence was rejected as they were under no compulsion under S. 94, I. P. C., to make a statement by which an innocent person is sent to gallows. 10 W. R. 48. If the witnesses are tutored, care is always taken that they tell the same story. 11 B. H. C. R. 146. In a case of assault five witnesses described the incident and all detailed the names of the eleven accused *in the same order*. It may safely be said that, without concert this could not possibly happen. It happened that the Mukhtar obtained a copy of this complaint made some days previously and, in order to guard

effectually against discrepancy, he had made each of the five witnesses *commit it to memory*. Field's Law of Evidence in Br. India, 8th Ed., p. XXIII. Where several witnesses bear testimony to the same transaction and concur in their statement of series of particular circumstances, there can be only two conclusions—either the testimony is true or the coincidences are the result of concert and conspiracy. To determine which is the case, there are two valuable tests. *First*, are the witnesses independent and acting without concert? *Second*, are the coincidences natural and undersigned? *Ibid* at p. XXII.

### Illustrations

(i) "Jeremiah Mason, a celebrated American Lawyer, possessed to a marked degree the instinct for finding the weak point. He was once cross-examining a witness who had previously testified to having heard Mason's client make a certain statement, and so important was this statement that the adversary's case was based on it alone. Several questions were asked by Mason, all of which the witness answered with more or less hesitation. Then he was asked to repeat once more the statement he had heard made. Without hesitation, he gave it, word for word, as he had given it in the direct examination. A third time Mason led the witness round to this statement, and again it was repeated *verbatim*. Then without warning he walked to the witness-stand, and pointing straight at the witness, said in a perfectly unimpassioned voice: "Let's see that paper you have in your waistcoat pocket. Taken completely by surprise the witness mechanically took a paper from the pocket indicated, and handed it to the lawyer. There was profound silence in the Court-room, as the lawyer slowly read in cold, calm voice, the exact words of the witness in regard to the statement, and called attention to the fact that they were in the handwriting of counsel on the other side. He then gathered up his papers with great deliberation, remarked there seemed to be no further need for his services, and departed from the Court-room.

Mason was asked how he knew that the paper was in the witness's pocket. "Well," explained Mason, "it seemed to me that he gave that part of his testimony more as if he had learned it than as if he had heard it. Then, too, I noticed that at each repetition of his testimony he put his hand into his waistcoat pocket, and then let it fall again when he got through" See 19 M. L. J. 60 (Journal).

(ii) "A fourteen-year-old boy, in giving his evidence was quite positive as to the time a certain accident occurred. The opposing counsel, to test his ability in such matters, asked him to estimate a period of three minutes. When the boy finally said the time was up, he was found right to the second. The lawyer hastily excused him, but afterwards discovered that, all the time, the boy had been looking at the Court-room clock directly over the lawyer's head." See 19 M. L. J. (Jour.) 25.

(iii) "In the memorable case of Eugene Aram who was tried in 1759 for the murder of Daniel Clark, an apparently slight circumstance in the conduct of his accomplice, led to his conviction. About thirteen years after the time of Clark's being missing, a labourer employed in digging for stone to supply a lime-kiln near Knaresborough, discovered a human skeleton near the edge of the cliff. It soon became suspected that the bones were those of Clark, and the coroner held an inquest. Aram and one Houseman were the persons who had last been seen with Clark, on the night before he was missing. Houseman was summoned to attend the inquest, and disclosed signs of



uneasiness. At the request of the coroner he took up one of the bones, and in his confusion dropped this unguarded expression, "This is no more Daniel Clark's bone than it is mine," from which it was concluded, that if he was so certain that the bones before him were not those of Clark's he could give some account of Clark's bones. He was pressed with observation, and, after various evasive accounts, he stated that he had seen Aram kill Clark, and that the body was buried in St. Robert's Cave, with the head to the right in the turn at the entrance of the cave, and upon search, pursuant to his statement, the skeleton of Clark was found in Robert's Cave, buried precisely as he had described it. Aram was consequently apprehended and tried at York in 1759. Houseman being the sole witness against him. He was convicted and executed, after having made a confession of the crime.

(iv) "In consequence of disclosure made by an accomplice a Police officer apprehended the prisoner *four* years after the murder on board the 'Shannon' frigate, in which he was serving as a marine. The officer asked him in the presence of his captain where he had been about three years before, to which he answered that he was employed in London as a day labourer. He then asked him where he had been employed that time *four* years; the man immediately turned pale, and would have fainted away hadnot water been administered to him. These marks of emotion derived their weight from the latency of the allusion—no express reference having been made to the offence with which the prisoner was charged—and from the probability that there must have been some secret reasons for his emotion connected with the event so obscurely referred to, particularly as he had evinced no such feeling upon the first question, which referred to a later period." See 6 Celebrated Trials 19.

## CHAPTER 93

### Of Witness Who was Alone

Sometimes the prosecution produces a witness who was alone at the time of the occurrence or who observed some material object, which is an important point in favour of the prosecution. The witness vehemently repeats that there was nobody near about at that time. Now it is very difficult to cross-examine him adequately. Such witnesses are generally procured in abduction cases. If such witnesses depose that they saw the abducted woman at different times and different places, they should not be believed in S. 498 cases (enticing away married woman), as they cannot be adequately cross-examined. See 100 P. L. R. 1916, 5 Lah. 396. Such witnesses are called *wajtakar* or chance witnesses and are easily procurable. See 1925 Lah. 319: 26 Cr. L. J. 1086: 88 I. C. 30. Wrottesley in his famous book "Examination of Witnesses" says:—"There is one kind of testimony which will sometimes baffle the utmost skill. It is the case of a witness who swears positively to some single fact, occurring when no other person was present, or but one, now dead or far distant, who, therefore, it is impossible to contradict, and equally difficult to involve in self-contradiction, because all the circumstances may be true, except the one which he has been called to prove. In such a case there remains only an appeal to the jury or Judge to look with suspicion upon evidence easily forged, so impossible to be disproved, and ask that it is worth to be tried by its intrinsic probabilities, showing, if you can, how improbable it is that such a statement should have been so made, or such a circumstance have occurred." Wrottesley, p. 146.

"It was the great complaint of Brougham, in Queen Caroline's trial, that the story was so well concocted that two witnesses were never called

upon one important fact. This, of course, was contrived so that there are several witnesses telling an untrue story, to break them down in cross-examination." Haris, p. 65.

## CHAPTER 99

### Of Woman Witness

#### *I. Difference between the Testimony of Men and Women*

1. As a whole men and women differ considerably mentally, though not so greatly as is usually affirmed and believed and there are certain sides of a woman's nature and outlook on life to which it is very difficult, if not impossible, for a man to gain access and to understand. The words and actions of a woman must not in all things be judged by the same standards as those of a man. A woman will be more roundly, readily, and more skilfully for her accomplice or lover than he for her; equally if she has come to hate him she will as a rule be more viciously vindictive than any man can be, and her thirst for revenge will carry her very far, until it is assuaged, and then it is quite likely that she will as bitterly repent. Women are apt to be more thoroughly good than good men, and bad women more iniquitously bad than bad men. Women are less amenable to the influence of fear than men, and so on. But each of these statements is open to amplification and to diminution, can only be taken as a vague signpost and must be applied with discretion and modification to suit personalities and to meet occasions, poetry and idealism must be laid aside. It is a grave and common error among men to under-rate the intelligence and understanding of women; on the whole, they are shrewder and have more "vision" than men; they may be, though it very doubtful that it is so, less logical than men; they almost always have a greater and sounder gift of intuition. They jump to conclusion at which most men arrive slowly. The average woman will find out the aim of her questioner more rapidly and surely than will the average man. It is impossible to define any method of examining women as distinct from that used when exploring the minds of men. The one rule of unquestionable value for investigator is: Do not think that you know all about women; that way lies certain defeat. In this as in most of the difficult affairs of life, experience is the best teacher. Experience soon teaches the shrewd detective that when a woman is pretty, she knows it; that she often thinks she is not and that she always tries to charm when she is out to deceive. Beware of the "sweet" woman. See *Crime and its Detection* by W. T. Shore, pp. 132—133 (1932 Ed.).

2. There is a vast difference between a man and a woman than the difference of bodily structure. A woman's mind thinks quite differently from that of a man. With her, love, charity, and maternal instinct play no unimportant part, and her sensibilities are more susceptible to shock. Unlike the man, she has not come to handgrips with the rough problems of the world, where love and charity find little place; and her views of life and her ideals have suffered less blunting. With her instinct, to no small extent, plays the part of cold calculation and logic. 4 M. L. T. 11 (Jour.).

3. "If you ask the difference between the word of a man and that of a woman, we can only reply in the words of the poet, 'man has great ideas, women profound sentiments; for the man, the world is his

heart; for the woman, her heart is the world.' " 4 M. L. T. 11. This explains the vast difference between the standpoints of observation of the man and the woman. We can even say beforehand how a man and a woman will assimilate a fact which they have both seen. And what is interesting and instructive, and at the same time right to establish with certainty, is exactly that one anticipates what one is going to hear. We are then armed against anything which may lead us astray and moreover we can go straight to the point, before an inaccurate and distorted statement has been definitely recorded." Dr. Hans Gross, *Criminal Investigation*, p. 96.

4. What difference does exist in character between the testimony of men and women has its root in the generally recognized diversity in the mental processes of the two sexes. Men, it is commonly declared, rely upon their powers of reason, women, upon their intuition. Women as a whole are more likely to trip than men, for they are prone to swear to circumstances as facts of their own knowledge, simply because they confuse what they have really observed with what they believe did occur or should have occurred, or with what they are convinced did happen simply because it was accustomed to happen in the past. Train, *The Prisoner at the Bar*, pp. 279, 281—282.

5. Dr. Hans Gross, an authority of very high rank, says "A woman is more patient, more attentive, more cunning, and more reflecting than a man." Professor James says, "Women in general train their peripheral visual attention more than men," that is to say, their attention to objects lying in the marginal portions of the field of vision. James, *Principles of Psychology*, Vol. I, p. 437.

6. The quickness and positiveness of women make them better witnesses than men; they are vastly more difficult to cross-examine; their sex protects them from many of the most effective weapons of the lawyer, with the result they are the more ready to yield to prevarication, and, even where the possibility of complete and unrestricted cross-examination is afforded, their tendency to inaccurate inferential reasoning, and their elusiveness in dodging from one conclusion to another, render the opportunity of little value." 4 Cr. L. J. 11 (Jour.).

7. "A man's testimony is better than woman's in regard to matters connected with the man's vocation." Moor, on the Weight and Value of Evidence, Vol. II, 1908, § 915.

8. "Women are less reliable than men in estimating the length of short period of time." *Ibid.*

9. In an admirable chapter on "Women in the Courts," Mr. Train regrets to say that observation would lead him to believe that women as a rule have somewhat less regard for the spirit of their oaths than men, and that they are more ready, if it be necessary, to commit perjury. This may arise from the fact that women are fully aware that their sex protects them from the same severity of cross-examination to which men would be subjected under similar circumstances. It is to be fatal to a lawyer's case if he be not invariably gentle and courteous with a female witness, and this is true even if she be a veritable Sapphira." Train, *The Prisoner at the Bar*, p. 285.

10. A woman has always an advantage over counsel. In the first place she is so everlastingly on the fidget that it is difficult to put any question whatever to her; in the second, she never sticks to the point and will not be kept to it; in the third place she is a woman, and has the sympathy of the Court.

If, further, she is clever and pretty, as long as jurors are men, she must be invincible. 20 M. L. J. Jr. 224.

11. If the woman happens to be of loose character, it has been held, that it is not safe to rely upon her evidence, without strong corroboration. 12 P. W. R. 1911 Cr.

12. Men at most differ as heaven and earth; but women, worst and best, as heaven and hell. *Tennyson*.

13. Women are ever in extremes; they are either better or worse than men, *Bruyere*.

14. They often say woman cannot keep a secret, but every woman in the world like every man, has a hundred secrets in her own soul which she hides from even herself. The more respectable she is, the more certain it is the secrets exist. See Austin O'Mallery.

15. It was Rudyard Kipling who said, "The female of the species is more deadly than the male."

16. A woman too often reasons from her heart; hence two-thirds of her mistakes and her troubles. *Bulwer*.

17. I have often thought that the nature of women was inferior to that of men in general, but superior in particular. *Lord Greville*.

18. Women have more heart and more imagination than men. *Lamartine*.

19. All the reasonings of men are not worth one sentiment of women. *Voltaire*.

20. Men have sight, women insight. *Victor Hugo*.

21. Women have the understanding of the heart which is better than that of the head. *Rogers*.

22. As exaggeration chiefly springs from an innate love of the marvellous, and is most remarkable in the softer sex, a prudent man will, in general, do well to weigh with some caution the testimony of *female witnesses*. This is the more necessary, in consequence of the extensive and dangerous field of falsehood opened up by mere exaggeration; for, as truth is made the ground-work of the picture, and fiction lends but light and shade, to detect the lurking falsehood often requires much patience and acuteness. In short, the intermixture of truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent. If due allowance be made for this feminine weakness of proneness to exaggerate, the testimony of women is at least deserving of equal credit to that of men. Indeed, in some respects they are superior witnesses; for, first, they are, in general, closer observers than men; next, their memories, being less loaded with matters of business, are usually more tenacious; and lastly, they often possess unrivalled powers of simple and unaffected, if rather lengthy, narration. See Taylor, S. 54, "Female witnesses are apt to be more emotional and loquacious. They generally indulge in long narratives and it takes some time to bring them to the point. But too frequent interruption is likely to embarrass and confuse them. In India female witnesses generally present peculiar

difficulties, on account of their habits of seclusion and observance of strict *purda*. Considerable allowance should be made in their case, and the Judge and the lawyer must first make sure that they have understood the questions thoroughly. As they do not appear before the public, their sense of shame and embarrassment stand in the way of giving clear answers." See Sarkar on Modern Advocacy.

23. In no cases it is more difficult to arrive at a confident verdict as to whether evidence is false or true than in cases in which woman alleges that they have been outraged. There is possibility of unintentional mis-statements produced by hysterical conditions. 81 I. C. 629.

24. In the case of rape of an innocent girl of tender age, her evidence is of great value, specially when she makes a statement immediately after the occasion. 82 I. C. 142.

25. There is another class of witness which may be mentioned, and that is the positive witness (generally a female or of female tendencies). It is usually very difficult to make the witness unsay anything she has said, however mistaken she may be; but you may sometimes lead her by small degrees to modify her statements, or induce her to say a great deal more in her positive way; and the great deal more may be capable of contradiction, or may itself contradict what has been said before by the same witness. If you deal with her skilfully, she will, in all probability, be equally positive about two or three matters which cannot exist together. She is the worst witness to unsay anything, but the best to lead into a contradiction of what she has said. Harris on Hints on Advocacy, Fourteenth Ed., 1911, pp. 90, 91.

### II. Fear of Cross-examination

"Sometimes you get a witness who is thoroughly frightened. Women sometimes get frightened and they tell you they do not know what they do know, and they tell you this even when their want of knowledge seems to be fatal to their case. What shall you do with such a witness? You have to show by a course of cross-examination that the witness simply does not know what she is talking about.

"Some year ago an eminent English Counsel encountered just that difficulty. The witness said she did not know what she did know; if he did not know she could not recover. So he began to a series of questions to her. 'What day of the week is this?' 'I do not know.' 'What year is this?' 'I do not know.' 'What is your name?' 'I don't know.' Well, it was now very apparent to everybody that the woman did not know what she was talking about. This exhibition saved her case." Cox's Advocate.

### III. Influence of Women in Court

Judges are always influenced by the presence of a beautiful woman in the dock or in the witness-box. Beauty of form generally affects the mind. It has been said that beauty is often worse than wine; intoxicating both the holder and beholder. Judges and jurors are sometimes spell-bound by the testimony of a smart, clever and handsome girl. Socrates called beauty a short-lived tyranny; Plato, a privilege of nature; Theophrastus, a silent cheat; Theocritus, a delightful prejudice; Carneades, a solitary kingdom; Aristotle, that it was better than all the letters of recommendations in the world; Homer, that it was a glorious gift of nature, and Ovid, that it was a favour bestowed by

the gods. Beauty is the wise man's bonfire, and the fool's furnace. Commenting on the influence of beautiful women, Pascal has said. "If the nose of Cleopatra had been a little shorter it would have changed the history of the world."

Victor Hugo says, that "men are women's playthings; woman is the devil's."

There can be no gainsaying the fact that the jurors are influenced and materially so, by the influence of a woman who is good looking and who is clever actress: take the many divorce cases of which you have read recently, for you will find this sort of thing more frequently in Civil than in Criminal Courts

### Illustrations

(i) Not long ago the newspapers were filled with the stories of a divorce suit, and it was said that the defendant was ogling the jurors daily throwing 'goo-goo' eyes at them: there was no doubt that she did, for I was present at one session of the Court, and it was sickening to see the way she gazed at the jurors and worse, to see the manner in which they evinced their pleasure, too silly to appreciate that she was merely playing for their favour. And although the testimony was overwhelmingly against her, the verdict was in her favour. 1 Cr. L. J. 252—254.

(ii) Another case in point is that of Mabel Parker one of the most skilful forgers in this broad land. She is now in the Bedford Reformatory of Women, but it took two trials to get her there. You could not call her a pretty girl, for the pace had left its traces, but she had large melting eyes, and she knew how to use them, too.

She amused herself and the jurors at the first trial by drawing pictures of herself and some of them. When her eyes were not on the pictures they were fixed on one or another of the jurors, and with a most beseeching, pleading expression. It was not in vain, for the jury disagreed. And when it came to the second trial the prosecution spent more time in selecting the jury and tried hard to get men who appeared as if they were devoid of sentiment. It was pitiful to see Mable throw her soul into the glances she gave towards the jury box, but this time it was of no use these twelve men convicted her without ado.

Three times was Dr. Kennedy tried on a charge of having murdered Dollie Reynolds in the Grand Hotel. At each his wife, a clever little woman, was at his side, and although he was convicted on the first trial I have little doubt that her presence at the second, which was granted by the higher Court, succeeded in bringing about disagreements, for it is a man with a great regard for stern justice who can contemplate having any hand in making a widow of a woman on whom he has looked for many days. I do not mean to say that this appealed to the jurors in just that cold, bare way, but that unconsciously they were influenced by some such consideration. 1 Cr. L. J. 252—254.

After citing the abovementioned instances of the power of woman in Courts, the same learned writer propounds a question and also gives the answer:

"Is there no way in which such a condition may be remedied, by which the woman who is guilty of a crime shall be punished for it, without regard for her personality, her beauty, or her viles?" the old lawyer was asked as he paused.

"I am afraid not," he replied, after a moment's thought. "At least, not while man is born of woman and is made of flesh and blood and with a heart." 1 Cr. L. J. 251-256.

I was waiting for his case to be called in the Court of a Magistrate, when a young pretty girl was produced in Court in police custody on a charge of robbery. She was represented by an old, experienced Advocate, who pleaded for her release on bail, with all the eloquence at his command. But the Magistrate was inexorable, and shook his head. He was going to write the order regarding rejection of bail application, when the counsel pleaded that his client experienced a good deal of difficulties or discomforts in the jail, and requested the Magistrate to interrogate her on this point. On being asked if she had any trouble in jail, this pretty girl raised her large eyebrows and artistically brought out two tears, one from each eye, and rolled them down, up to the cheeks.

Shakespeare has aptly remarked: "What a hell of witchcraft lies in the small orb of one particular tear." She was mute like a statue. Her silence was more eloquent than half an hour's learned address by her counsel. The Magistrate looked at her and said "Bail, in the sum of the Rs. 500, with one surety."

Saville has truly remarked: "Women have more strength in their looks than we have in our laws, and more power by their tears, than we have by our arguments."

"If a woman is pretty, dresses stylishly and is clever enough to use her natural advantages to the best end, she is almost certain to enlist the sympathies of at least one of the twelve men on a jury. If she is on trial in a criminal case, this sympathy will lead the juror to accept readily her defence, and in such an instance it is an impossibility to obtain a conviction."

"If she is merely a friend of the defendant and tells her story skilfully and acts her part well, the sympathy will be extended to the accused. And if she is in the role of accuser, an injustice is often worked against the person she and who may be innocent. Jurors are susceptible, and there are hundreds of cases where a woman, employing all her wiles with discretion, will sway some of them to decide contrary to the weight of evidence."

A lawyer once remarked, he felt assured his case was half won before he entered the Court-room, if he had as a client a woman, pretty, with a charming smile and a bewitching glance.

In a case in St. Louis a few weeks ago a jury was roundly scored by the Judge and prosecuting attorney after it had brought in a verdict directly at variance with the weight of evidence. A woman, young and pretty, was charged with theft. During the trial she shot roguish glances at the men in the jury box, and her conduct was somewhat more pronounced at certain stages as the prosecutor took good care to explain when he denounced the verdict. When Judge Taylor heard the verdict which set the woman at liberty he said to the jurors:

"It is pity that a sickening flirtation between jurors and the defendant in a criminal case has the power in this Court to defeat the ends of justice."

Then C. Orrick Bishop, Assistant Circuit Attorney, had his say. Pointing his finger at the jurymen he began, sarcastically:—

"Gentlemen of the jury, I thank you for your verdict. I thank

you in the name of all that is shameless and lawless in crime and criminals I thank you for the discriminating taste you have shown, for the high order of citizenship you have displayed, in being influenced in your verdict by a pretty woman's winks and a glimpse of a bit of open-work stocking. You are a credit to your class." 1 Cr. L. J. 251.

### Difficulties in Cross-examination of Female Witness

A woman has always an advantage over counsel. In the first place she is so everlastingly on the fidget that it is difficult to put any question whatever to her ; in the second place she never sticks to the point, and in the third place, she is a woman and has the sympathy of the Court. Further, if she is clever and pretty as long as jurors are men, she must be invincible. There is no witness more difficult in the whole world to cope with than a shrewd old woman who apes stupidity only to reiterate the gist of her testimony in such incisive fashion as to leave it indelibly imprinted on the minds of the jury. The lawyer is bound by every law of decency, policy and manners to treat the aged dame with utmost consideration. He must allow her to ramble on discursively in answer to the simplest question, in defiance of every rule of law and evidence ; must receive imperturbably the opinions and speculations upon every subject of both herself and (through her) of her neighbours, only to find that, when he thinks she must be exhausted by her own volubility, she is ready, at the slightest opportunity, to break away again into a tangle of guesswork and hearsay, punctuated by conclusion and ejaculations. Woe be unto him if he has not sense enough to wave her off the stand ! He might as well try to harness a Valkyrie as restrain a pugnacious old Irish woman who is intent on getting the whole business before the jury in her own way.

### Illustrations

(i) In the case of Gustav Dinser, accused of murder, a vigorous old lady took the stand and testified forcibly against the accused. She was as "fresh as paint," as the saying goes, and absolutely refused to answer any questions put to her by counsel for the defence. Instead, she would raise her voice and make a savage onslaught upon the prisoner, rehearsing his brutal treatment of the deceased on previous occasions and getting in the most damaging testimony.

"Do you aver, Mrs.—," the lawyer would inquire deferentially, "that you heard the sound of three blows?"

"Oh, thim blows!" the old lady would cry—"thim terrible blows! I could hear the villain as he laid him on! I could hear the poor, pitiful groans of her, and she so sufferin'! 'Twas awful! Howly Saints 'twould make her blood run cold! An' thin they'd come again!"

"Stop! stop!" exclaimed the lawyer.

"Ah, stop, is it? He can't stop me till Oi've had me say to till the whole truth. I says to me daughter Ellen, says I, 'Th' horrid baste is after murtherin' the poor thing,' says I; run out an' get an officer!"

"I object to all this!" shouts the lawyer.

"Ah, ye object do ye?" retorts the old lady. "Sure an' ye'd have been after objectin' yerself if ye'd heard thim terrible blows that kilt her—the poor, sufferin' swate crayter; I hope he gits all that's comin' to him—bad cess to him for a blood-thirsty divil!"



The lawyer ignominiously abandoned the attack.

(ii) The following case would also serve as another illustration:—  
 "During a recent trial in one of the Courts of Baltimore city, the object of which was to set aside a certain deed of trust, a large, portly German woman was called as a witness for the plaintiffs. Her testimony was for the purpose of showing the mental incapacity of the grantor, whose name we will call Margaret E. Jones. After the witness took the stand and was sworn, the examination commenced as follows:—

Attorney for plaintiffs.—"Did you know the late Margaret E. Jones?"

Witness.—"Yes, she was crazy."

Attorney for defts.—"We object."

Witness.—"You can object all you want but she was crazy, just the same."

Court: (seeking so placate the witness who was becoming very irritable). "Madam, we have certain rules for the giving of testimony in a Court-room, and I wish that you would try and give your answers to the questions without volunteering information."

Witness.—"Why, your Honour, I know all about these rules, but I say Maggie Jones was crazy. I mean she was as crazy as he—and if you dont want me to tell you she was crazy I go home."

(iii) There is a somewhat similar instance, but one even better exhibiting the cleverness of an old woman, which occurred in the year 1901. A man named Orlando J. Hackett, of prepossessing appearance and manners, was on trial, charged with converting to his own use money which had been entrusted to him for investment in realty. The complainant was a shrewd old lady, who together with her daughter, had had a long series of transactions with Hackett which would have entirely confused the issue, could the defence have brought them before the jury. The whole contention of the prosecution was that Hackett had received the money for one purpose and used it for another. During preparation for the trial the solicitor for the complaint had both ladies in his office and made the remark.

"Now, Mr.—don't forget that the charge here is that you gave Mr. Hackett the money to put into real estate. Nothing else is of much importance."

"Be sure and remember that, mother," the daughter had admonished her.

In the course of a month the case came on for trial before Recorder Goff, in Part II, of the General Sessions. Mrs.—gave her testimony with great positiveness. Then Mr. Lewis Stuyvesant Chanler arose to cross-examine her.

"Madam," he began courteously, "you say you gave the defendant money?"

"I told him to put it into real estate, and he said he would," replied Mrs.—firmly.

"I did not ask you that, Mrs.—," politely interjected Mr. Chanler, "How much did you give him?"

"I told him to put it into real estate, and he said he would!" repeated the old lady wearily.

"But, madam, you do not answer my question!" exclaimed Chanler. "How much did you give him."

"I told him to put it into real——" began the old lady again.

"Yes, yes!" cried the lawyer; "we know that! Answer the question."

—estate, and he said, he would!" finished the old woman innocently.

"If your Honour please, I will excuse the witness. And I move that her answers be stricken out!" cried Chanler savagely.

The old lady was assisted from the stand, but as she made her way with difficulty toward the door of the Court-room she could be heard repeating stubbornly:

"I told him to put it into real estate, and he said he would!"

Almost needless to say, Hackett was convicted and sentenced to seven years in State prison. See 4 Cr. L. J. 9—11 (Jour.).

(w) One would say that women are less able ordinarily to distinguish between direct and indirect discourse than men. Says a learned writer, "I have repeatedly seen gentlewomen go upon the witness-stand and fail utterly to perceive that what is desired by the Court is the exact language of the defendant, not statement that he said that so and so had occurred." A story is told by Judge Nott, of Washington, which illustrates the confusion that sometime results from this inability to differentiate between the two sorts of discourses. An old coloured mammy was called to testify in a case where the defendant, also a darky, had thrown over a ladder which was leaning against his open window and caused it to fall on the sidewalk where it struck and injured an "enemy," named Jones, on the back.

"What did Mr. Jones say when the ladder hit him?" inquired the prosecutor.

"Mistah Jones, he said, 'Oh, his back!'"

"Now, think a minute, Auntie," cautioned the lawyer. "Use his exact words."

"He said, 'Oh, his back!'" repeated the witness in an aggrieved tone.

"Now, now" cried the prosecutor. "Didn't he say, 'Oh, my back?'"

The old black mammy drew herself up indignantly and with withering scorn replied:

"Mistah Jones didn't say anything about your back at all! He said, 'Oh, his back!'" See 4 Cr. L. J. 9—11 (Jour.).

(v) The witness was a lady. Parenthetically I may say I have never heard Sir Edward Carson cross-examine another lady.

She was extremely pretty, and it must have gone to the heart of any one to question her as to alleged lapses from the path of virtue. It was one of the few occasions when he was not successful. He asked her question after question, all bearing upon the point, and he did not trouble to wrap up his questions in lavender—he never does. But to all his questions she replied quickly, briefly, and smilingly, prefacing

each answer with "No or yes, Mr. Carson."—as he then was. The cross-examination lasted all day, and at the end of it the lawyer was as deadly quiet as ever, and the witness even more pleasant and attractive than she was in the morning.

I give an example of this interesting discussion.

"D'ye think, madam," he asked, "it was right of ye to allow Mr. X to take off his boots in your room?"

"Certainly, Mr. Carson. They were wet."

"But, madam, consider, Mr. X was a married man."

"I know that, but what difference did that make to his feet?"

"Madam, ye are trifling with the Court."

"No no, Mr. Carson; please don't say such unkind things."

"Madam, I'll again ask ye to remember that Mr. X was a married man and ye were a single woman."

"I know all that, Mr. Carson, but I can't see what that has to do with Mr. X's boots."

In the end, despite an unfavourable summing up, the lady won. 20 M. L. J. 223 (Jour.).

(vi) In a Missouri case where an electric street car collided with a wagon, a woman passenger on the car testified as follows:

Q. "What was the first thing you noticed of this collision?"

A. "When I got on the car (at the House of the Good Shepherd) I was so nervous, I thought there was going to be an accident."

Q. "Why did you think so?"

A. "Because the motor-man seemed so mean and saucy before he started the car."

On cross-examination she stood by her guns, thus:

Q. "You knew there was going to be an accident happen there anyhow?" A. "Yes, I did."

Q. "How did you know that?"

A. "Because I felt like that, and I was so nervous, and the motor-man was so mean." See 94 S. W. Rep. 876—878.

(vii) A woman was called as a witness to disprove the genuineness of the signature of a testatrix. "That looks like Mrs. Berg's," said the witness, "but she never wrote that, she never wrote that as sure as the sun shines in heaven, because she never wanted to make such a will ..... She would not write her name Cassie Berg, because it was Katherine Berg." See 34 Atl. Rep. 234.

(viii) Croake James tells a story of how, only by a flash of genius, Sir James Scarlett saved a cause. The famous berrister in a breach of promise case (*Foot v. Green*) was for the defendant, who was supposed to have been cajoled into the engagement by the plaintiff's mother, afterwards the Countess of Harrington. The mother, as a witness, completely baffled Scarlett, who, on behalf of the defendant, cross-examined her; but by one of his happiest strokes of advocacy he turned his failure into success.

" You saw, gentlemen of the jury, that I was but a child in her hands. What must my client have been ? " 4 Cr. L. J. 9-11 (Jour.).

(ix) A woman will inevitable couple with a categorical answer to a question, if in truth she can be induced to give one at all, a statement of damaging character to her opponent. For example :

Q. " Do you know, the defendant ? "

A. " Yes, to my cost ! "

Q. " How old are you ? "

A. " Twenty-three. Old enough to have known better than trust him. "

Forced to make an admission which would seem to hurt her position, the explanation, instead of being left for the re-examination of her own counsel is instantly added to her answer then and there; as,

Q. " Do you admit that you were on Forty-second Street at midnight ? "

A. " Yes. But it was in response to a message sent by the defendant through his cousin. " 4 Cr. L. J. pp. 5-7 (Jour.)

(x) A lady was cross-examined as to her means of livelihood thus:—  
" How do you support yourself ? "

" I am a lady of leisure ! " replies the witness (arrayed in flamboyant colours) snappishly.

" That will do, thank you," remarks the lawyer with a smile. " You may step down. " 4 Cr. L. J. pp. 5-7 (Jour.)

(xi) " What do you do for a living ? " asked the lawyer of a female witness.

The witness, a rather deceptively-arrayed, woman, turned upon him with a glance of contempt :

" I am respectable married woman, with seven children," she retorted. " I do nothing for a living except cook, wash, scrub, make beds, clean windows mend my children's clothes, mind the baby, teach the four oldest their lessons, take care of my husband, and try to get enough sleep to be up by 5 in the morning. I guess if some lawyers worked as hard as I do they would have sense enough not to ask impertinent questions. " 4 Cr. L. J., pp. 5-7 (Jour.)

(xii) James, in his *Curiosities of Law and Lawyers*, says that one Mr. Garrow was examining a very young lady, who was a witness in an assault case, and asked her if the person who was assaulted did not give the defendant very ill language; if he did not utter words so bad that he (the counsel) had not impudence enough to repeat them.

The lady replied. " Yes. "

" Will you, madam, be kind enough to tell the Court what those words were ? "

" Why sir," she replied, " if you have not impudence enough to speak them, how can you suppose that I have ? " 4 Cr. L. J. 8.

(xiii) There can be no gainsaying the fact that jurors are influenced, and materially so, by the influence of a woman who is good looking and who is a clever actress; take the many divorce cases of which you have read

recently, for you will find this sort of thing more frequently in Civil than in Criminal Courts. Not long ago the newspapers were filled with the stories of a divorce suit, and it was said that the defendant was ogling the jurors daily throwing 'goo-goo' eyes at them; there was no doubt that she did, for I was present at one session of the Court, and it was sickening to see the way she gazed at the jurors and worse, to see the manner in which they evinced their pleasure, too silly to appreciate that she was merely playing for their favour. And although the testimony was over-whelmingly against her, the verdict was in her favour. 1 Cr. L. J., 252—254.

(xiv) See illustration to Ch. 24 *Supra*.

(xv) "Pray, madam," says counsel Mr Wiggins, asking for information, "she being neither advocate nor defendant, who are you?"

"A honest woman, Sir," says the lady, "which is more that you can say."

There was a laughter, of course, because the meaning was ambiguous.

Every one laughs occasionally at what he does not understand, "Madam," says Wiggins in a supplicatory tone:

"And Madam to you," replies the lady, with great emphasis.

"You must behave yourself," says the Judge, who had been listening attentively with his hand behind his ear.

"Yes," says she, with biting sarcasm, "I can behave myself quite as well as they who are in a higher sphere." This was a thrust for the Judge who was almost reduced to Wiggins' level. His Honour said no more. And so this happy party went on; the woman best of all had everybody at her mercy, because she alone had that essential quality in the conduct of case that allowed nothing to disconcert her. See Harris.

(xvi) A Mrs. Philips was a witness. Every time the counsel hit her, she would make a fresh jerk and tell something more. Finally the lawyers got tired and turned her over to our side. I said "Mrs. Philips, there is just one question: Mrs. Philips, before you went to the stand as a witness, didn't you swear that in this case, you would tell the truth, the whole truth and nothing but the truth?"

"Yes, sir," she snapped at me.

"Well, do you think you have kept the contract?"

"Yes, sir," was the answer "and a little more." See the same cited in 14 Cr. L. J. 27 (Jour.)

(xvii) A thief was convicted of looting various apartments in New York city, of over eighty thousands dollars worth of jewellery. The female owners were summoned to identify their property each and every one positively identified various of the loose stones found in the possession of the prisoner as her own. This was the case even when the diamonds, emeralds and pearls had no distinguishing marks at all. It was a human impossibility actually to identify any such objects and yet these eminently respectable and intelligent gentlewomen swore positively that they could recognize their jewels. They drew the inference merely that as the prisoner had stolen similar jewels from them these must be the actual ones which they had lost, an inference very likely correct, but valueless in a tribunal of justice.

One of the ladies referred to testified as follows:

Q. "Can you identify that diamond?"

A. "I am quite sure that it is mine."

Q. "How do you know?"

A. "It looks exactly like it."

Q. "But may it not be a similar one and not your own?"

A. "No; it is mine."

Q. "But how? It has no marks."

A. "I don't care. I know it is mine, I swear it is."

The good lady supposed that unless she swore to the fact, she might lose her jewel, which was, of course, not the case at all, as the sworn testimony founded upon nothing but inference left her in no better position than she was in before. See 4 Cr. L. J. 6 (Jour.)

(xviii) "A woman testifying for the contestant of a will spoke of a lamp chimney which broke while the testator was intoxicated in his store. To emphasize the breaking of the chimney, and impress, if possible, the danger of the situation created thereby, she swore that it broke into 'a thousand pieces.' Animadverting on the bit of hyperbole the Court said: 'Common experience teaches that it would be a most unusual—indeed, almost miraculous—thing for a heated lamp chimney to break into a thousand pieces. As we read the testimony, we involuntarily conclude that the witness did not mean her statement to be taken literally; and yet the expression betrays a lack of exactness in truth, and a zeal in behalf of the contestant's case which must affect the credit we accord the witness.' See Per Chancellor McGill in *Fluck v. Rea*, (N. J. 1893) 27 Atl. Rep. 636 at p. 637.

(xix) In a murder case in Kansas the defendant admitted the killing and pleaded self-defence. His testimony as to the occurrence did not appear unreasonable, and practically the only incriminating evidence was that of a woman who had been living in illicit relations with the defendant at the time of the homicide, and for about two years thereafter, at which time she became jealous over his attentions to another woman and told the story which resulted in his conviction, although prior thereto she had maintained his innocence. One could hardly read her testimony, said Mr. Justice Smith of the Supreme Court, without questioning whether it is really the truth, or is another illustration of the lines:

"Heaven has no rage like love to hatred turned. Nor hell a fury like a woman scorned." See *Moor on Facts*, p. 1082.

(xx) In a divorce case filed by a husband for alienation of his wife's affections a woman detective was employed. She rented a room in a boarding-house conducted by the wife's sister where the clandestine affairs had been carried on. When the detective woman appeared in the witness-box, the Counsel cross-examined her in the following manner:—

Q. When you first went to the house you told them your name was Maratha Greene? A. Yes, Sir.

Q. That was a lie, wasn't it? A. Well, yes.

Q. You told them you were a nurse? A. Yes.

Q. That was a lie, wasn't it? A. Yes.

Q. You said though that you were unemployed? A. Yes.

Q. That was a lie, wasn't it? A. Well, you see, we have to do that in our business.

Q. You mean you make a business of lying? A. No, but sometimes we have to lie when carrying out our business.

Q. And since you make a practice of lying you become adept at it?

A. Well, there is no other way we can carry out our work.

Q. And you get paid for doing this sort of work? A. Yes.

Q. And you engage in this sort of work because you are paid for it?

A. Yes.

Q. In other words, instead of being an amateur liar who lies for the fun of it, you are a professional liar, lying for the money in it.

### Value of Evidence of Wife

Ordinarily a woman testifying on behalf of her husband is put in the category of biased witness, whose testimony must be received with some allowance, when it is opposed to probabilities or disinterested direct testimony. Moor on the Weight and Value of Evidence, Vol. II, S. 925.

S. 120, Evidence Act, says that: "In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness." But provisions of S. 120, Ev. Act, are subject to S. 122, Ev. Act, which forbids the spouses to disclose communication during marriage. See S. 122, Ev. Act, says that: "No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suit between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other." See also Taylor, S. 909, 40 C. 891, 1923 L. 40, Wigmore, S. 2337.

### False Charges of Offences by Women against their Person

A number of false charges are brought by women, in order to avenge their husbands or other relations, or to re-establish their own character. False charge of rape may be easily set up by girls at the age of puberty. The medical evidence can rarely be more than merely negative; it is practically impossible from it alone to say that there may not have been such a degree of penetration as constitutes rape in law. When a girl over sixteen or a woman is in question, Juries are very prone to think that "there cannot be smoke without fire." Where the sexual organs were found uninjured and marks of blood on the clothes of the child were on the outside, and the whole fibre of the stuff had not been completely penetrated by the liquid, the charge was proved to be false. Taylor's Med. Jur., 1928, p. 130. In a few cases false charges are disproved by medical evidence—in others, medical men may be sometimes the dupes of designing persons. In majority of cases, the falsehood of the charge is proved by inconsistencies in the statement of the prosecutrix herself. Amos remarked, that for one genuine case of rape tried on the Circuits in his time, there were on the average twelve pretended cases. Taylor's Med. Jur., 1928, p. 111.

Women intent on revenge or extortion will frequently bring a false charge against a man, producing a well-tutored child as the victim. Another class of false accusation is that brought by the woman who was a consenting party until caught in the act. In such a case no injury will be found unless the woman was virgin. Lyon's Med. Jur., 1935, p. 375.

Modern Magistrates look with great suspicion on all charges of rape unless made in a day or two after its alleged occurrence. Ryon's Med. Jur., 1836, p. 309; Taylor's Med. Jur., 1928, pp. 128-129.

No charge is more easily made than rape, or rebutted with more difficulty. Ryon's Med. Jur., 1836, p. 309.

Rape is often set up to hide the downfall of a young girl who wishes to avoid her shame, by turning the pity and sympathy of everyone towards her; girls often invent attacks by quite unknown persons or, grave still, they bring false accusations against a person named. In such cases the real seducer is hardly ever accused of the rape. He is spared and no charge is made until the fact of pregnancy is certain. "Criminal Investigation" by Hans Gross, 1906, p. 18.

The following illustrative cases of false complaint by women of personal wrongs to her are given in Wills' Circumstantial Evidence :—

Sir Mathew Hale mentions a very remarkable case, where an elderly man was charged with a criminal assault upon a young girl of fourteen years of age, but it was proved beyond all doubt, that a physical infirmity rendered the perpetration of the crime alleged utterly impossible. The prosecutrix of an indictment against a man for administering arsenic to her, to procure abortion, deposed that he had sent her a present of tarts of which she partook, and that shortly afterwards she was seized with symptoms of poisoning. Amongst other inconsistencies, she stated that she had felt a coppery taste in the act of eating, which it was proved that arsenic does not possess; and from the quantity of arsenic in the tarts which remained untouched, she could not have taken above two grains while after repeated vomitings the alleged matter subsequently preserved contained nearly fifteen grains, though the matter first vomitted contained only one grain. The prisoner was acquitted, and the prosecutrix afterwards confessed that she had preferred the charge from motives of jealousy. We reasonably expect to discover in the demeanour of a person who has just reason to complain of personal injury or violated honour or right, prompt and unequivocal indications of that sense of wrong and insecurity which such acts of violence or wrong-doing are calculated instinctively to arouse in the mind of the injured person. Sir Mathew Hale, in reference to one of the greatest of human outrages, says: "if she, (*i.e.* the woman complaining) concealed the injury for any considerable time after she had opportunity to complain; if the place where the act was supposed to be committed were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the act was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned." These cautionary considerations are as cogent and as much needed at the present day as when they were written, and are applicable with more or less force to accusations of every description but they are more espe-



cially weighty and pertinent in reference to the particular crime referred to of which the learned author has said that "it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though ever so innocent," Such cases, he further observes, are not uncommon, and he has related the particulars of two cases, where, though the charges were groundless, the parties with difficulty escaped. "I only mention these instances," said that upright judge, "that we may be the more cautious, upon trials of offences of this nature wherein the Court and jury may with so much ease be imposed upon; without great care and vigilance, the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses, False charges of this kind have unhappily been too common and too successful in all ages. The social consequences of female dishonour are so deadly, and the inducements to falsehood and revenge so peculiar and so powerful, that there is no class of cases in which it is more important to obtain an exact knowledge of the motives and character of the complainant. For these reasons great latitude of cross-examination is permitted in cases of this kind, and it is competent to the prisoner to give evidence not only of the prosecutrix's general bad character, but also of previous acts of immorality committed with himself; with regard, however, to other particulars of alleged misconduct, such as alleged acts of immorality with other men, the general rule holds good that the prosecutrix's answers on cross-examination cannot be contradicted. Nor is the danger of false accusation confined to be particular class of offences which has been specially adverted to. Inducements to prefer false charges may operate with greater or less force with regard to accusations of every kind. Two women were capitally convicted of robbing a young girl named Canning, and afterwards confining her for twenty-nine days without sustenance, except a quarter loaf and a pitcher of water. Public odium was intensely excited against the prisoners, and they very narrowly escaped execution, and yet it was clearly ascertained that the charge was fabricated in order to conceal the prosecutrix's misconduct during the period of her absence from her master's house. Canning was afterwards convicted of perjury, and sentenced to be transported. Nine persons were convicted on a charge of conspiring to carry off from the house of her guardian a young lady of seventeen years of age, in order to procure her clandestine marriage with a young man of low condition for whom she had formed an attachment, and with whom she had indulged in vulgar familiarities. She gave her testimony in a manner apparently so artless and ingenuous that she greatly prepossessed the judge, and favourably impressed the jury that they stopped the prosecutor's counsel when about to reply and returned a verdict of guilty. Her story was nevertheless discovered to be a fabrication, for the purpose of extricating herself from the shame of her levity and misconduct, and she as well a witness who had corroborated her story were afterwards convicted of perjury. See Will's Circumstantial Evidence.

## CHAPTER 100

### Order of Examination of Witnesses

S. 135, Ev. Act, provides that: "The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law by the discretion of the Court."

The order in which evidence has to be produced by the parties is regulated by the Criminal Procedure Code in criminal cases (See Ss. 203, 251, 257, Cr. P. C.) and by the Civil Procedure Code in civil cases, (O. 18, C. P. C.) In criminal cases the prosecution always begins, but in civil cases the right to begin is determined by the form of the issues, which are framed from the pleadings and examination of the parties, and the contents of the documents produced by them. The general rule is that the plaintiff has the right to begin, but, if the defendant admits the facts alleged by the plaintiff and contends that, either in point of law or on some additional facts alleged by him, the plaintiff is not entitled to any part of the relief which he seeks, then the defendant has the right to begin. See O. 18, r. 1, C. P. C.

It has been held that though counsel has discretion, the Court has power under S. 135 to direct the order in which the witnesses shall be examined—*per* Jenkins, C. J. in 39 Cal. 245. In the same case Woodroffe, J. said: "The Court has always the power to do this under S. 135 of the Evidence Act." "I mean to decide this and no further. That in each particular case there must be some discretion in the presiding Judge, as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice"—*per* Abbott, L. C. J., in *Bastin v. Carew*, 1824 Ry. and M. 127. The Court should be very slow to interfere with the discretion of counsel, as to the order in which witnesses should be examined (5 C. W. N. 15.) No mode of procedure can be more unsatisfactory than that of allowing the principal defendant in a suit to give his evidence before the plaintiff's case has been opened or the evidence of his witnesses given, 45 M. L. J. 363, 116 P. W. R. 1908.

If you call a number of weak witnesses one after the other, the jury will come to the conclusion that the case is weak, and evidence of the stronger witnesses will be proportionately discounted; whereas, if you have a number of witnesses weak and strong, but all necessary, begin with one of your strongest. It may be that the order of time or circumstances will decide as to the next; but always endeavour to follow up weakness with strength. Harris, p. 326.

Where witnesses are summoned for examination in a *de novo* trial, the order in which they are to be examined rests at the discretion of prosecution. 1934 N. 209. If prosecution witnesses are recalled for further cross-examination the order of examination rests with the accused. 1933 C. 189. Defence has the right to cross-examine prosecution witnesses in the order it wishes. It may cross-examine the complainant after the witnesses. 1933 C. 189:34 Cr. L. J. 347.

The manner of putting in the testimony is of great importance, and will often tax the advocate to the utmost of his skill and sagacity. The arrangement of his testimony and the order in which he calls his witnesses will also

demand much care and attention. The advocate should, in nearly every case, put his most intelligent and most honest witness in the box first. It is necessary that a good impression should be made upon the Court and jury at the earliest possible moment. The first witness generally has to run the gauntlet of a sharp cross-examination, and if the first witness passes this creditably, he encourages the other witnesses on the same side, and makes a favourable impression upon the Court and jury which his adversary will find it difficult to eradicate.

If he pursues another course, and is imprudent enough to place a weak, foolish, or timid witness in the box first, the witness may do incalculable harm to the cause of the party who introduced him. It becomes necessary sometimes for the plaintiff only to put in enough of his evidence to make out a *prima facie* case, and it is occasionally best to keep back the strongest testimony till the testimony of his opponent has been heard, and then offer it by way of rebuttal to the case which has been made against him.

After the jurors have heard the testimony for the defence they are better prepared than they were before to appreciate the remaining testimony of the plaintiff. It is highly important for the advocate to call, in immediate connection with each other, all the witnesses to the same subject-matter so as to prevent the attention of the jury from being distracted by the introduction of different portions of the case which constitute new subjects, between the parts of what are properly related to each other.

The same may be said as to the introduction of the testimony for the defence. It should be introduced in the most orderly and regular manner: each portion of the case should be proved separately. See Wrottesly, pp. 12-13.

## CHAPTER 101

### Ordering a Witness Out of Court

When a witness is being examined, the other witnesses should not be allowed to remain in the Court-room, otherwise the effect of cross-examination will be nullified. In some cases it is inadvisable to examine witnesses separately and the out of hearing of the other. The purpose of this separate examination of witnesses is to prevent, if possible, the danger of a concerted story among them and to prevent the influence which the account given by one may have upon another. On the application of the counsel for a party, the judge will order the witnesses for both sides to withdraw at any stage of the proceedings. (M. C. & P. 632). In the Exchequer Division it was said to be an inflexible rule that any witness who remained in Court after an order to withdraw, could not on any account be examined. But the better opinion would now seem to be that the Judge may not refuse to admit the evidence of a witness under these circumstances. He may fine or commit the witness for contempt and the disobedience of the witness may well become the subject of comment and remark. *Cobbett v. Hudson* 1 E. and B. 11 (14).

### Certain safeguards observed in conducting Cross-Examinations

"If the Judge deems it essential to the discovery of truth that the witnesses should be examined out of the hearing of each other, he will order them all on both sides to withdraw expecting the one under examination; and this order, upon the motion of either party, at any stage of the trial, is rarely withheld, though it cannot be demanded of strict right. The parties themselves will sometimes be included in the order to withdraw, as will also be the case with the prosecutor in a criminal proceeding if it be

proposed to examine him as a witness. Where, however, an attorney in the cause is about to give testimony, an exception is usually allowed in his favour upon a statement being made by counsel, that his personal attendance in Court is necessary. (4 C. & P. 91). So medical or other professional witnesses, who are summoned to give scientific opinions upon the circumstances of the case, as established by other testimony, will be permitted to remain in Court until this particular class of evidence commences; but then, like ordinary witnesses, they will have to withdraw and to come in one by one so as to undergo a separate examination. See *Alison*, Prac. Cr. L. J. 489-542-545

"If a witness remains in Court in contravention of an order to withdraw, he renders himself liable to fine and imprisonment for the contempt; and, until lately, it was considered that the judge, in the exercise of his discretion, might even exclude his testimony. But it seems to be now settled that the judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence. (2 M & Rob. 423).

The practice of ordering witnesses out of Court may be traced to a remote antiquity, it being noticed with approbation by Fortesque in his work *De Laudibus Legum Angliæ*; and no man who has reflected upon the nature of evidence, or even read the quaint story of Susannah narrated in the Apocrypha, but must acknowledge the utility of such a course as an admirable means of detecting conspiracy and falsehood. In order, however, to render the practice duly efficient, it is not enough to order the witnesses simply to withdraw out of hearing, but means should be afforded for keeping them in separate rooms until they are called for; so that they might lose the opportunity, not only of listening to the examination of those who preceded them, but, what is of equal importance, of conversing with them afterwards. In Scotland, all the witnesses on either side are usually shut up in an apartment by themselves, whence they are successively and separately called into Court to be examined; and the system of separate examination also prevails theoretically; if not practically, in both Houses of Parliament." *Vide Taylor v. Lawson* 3 C & P 513, *Taylor on Evidence* 5th Ed. Vol. II, Pp. 1211-1214.

S. 352, Cr. P. Code, provides that a Judge can order a witness out of Court or can direct that a Court-room should be cleared of all persons present there except the parties or their counsels. The universal practice in India is that when witness is being examined, other witnesses should not be present. See 1934 A. 840 : 152 I C 30. S. 352, Cr. P. C., makes no exception even in the case of Police Officer. 1925 N. 296 : 25 Cr. L. J. 1150. The rule contained in S. 352 does not extend to parties or their counsel, unless the counsel is cited as a witness. 44 M. 916, 62 I. C. 828, 1934 A. 840.

When a witness is present during the examination of another witness, the Court has inherent power under S. 151, C. P. C., not to hear him. 1934 A. 840.

## CHAPTER 102

### Right to Cross-examine Co-Accusee's and Co-Defendant's Witnesses

When two or more persons are tried together on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of others, if he gives any testimony to incriminate them, (1855, *Dears C. C.* 431) and where two prisoners are tried together, and one

gives evidence affecting the other, the other prisoner has a right of cross-examining him. (1902) 1 K. B. 882.

No special provision is made in the Evidence Act for the cross-examination of the co-accused's or co-defendant's witnesses.

There might be many cases of failure of justice if a co-accused were not allowed to cross-examine witnesses called by a person whose case was adverse to his, for the effect might be, practically that a Court might act upon evidence, which was not subject to cross-examination. The Evidence Act gives a right to cross-examine witnesses called by the adverse party. 21 C. 401.

Where several persons are jointly interested in the subject-matter of the suit, an admission of any one of them is receivable against the others, provided the admission relates to the subject-matter in dispute, and be made by him in his character of a person jointly interested with the party against whom it is sought to be used. The requirement of the identity of legal interest is of fundamental importance (*See* 45 C. 150). If the interest of one defendant is quite adverse to that of the other, and is separately represented, there is no reason why cross-examination should not be allowed. So, it has been held that one defendant whose interests are separately represented may cross-examine another with a view to discrediting evidence which he has given in favour of the plaintiff, (1 M. H. C. 456). Where some of the defendants support the plaintiff's case and others oppose it, those who support the plaintiff's case should be ordered to cross-examine plaintiff's witness first, if they desire, and to call their evidence and address the Court before the defendants who oppose the plaintiff's case do so. 58 I. C. 288. *See* Sarkar's Modern Advocacy, pp. 396-397.

## CHAPTER 103

### Right of Cross-Examination

In criminal cases, although the prosecution is not in strictness bound to call every witness named on the back of the indictment, it is usual to do so in order to afford the prisoner's counsel an opportunity to cross-examine them; and if the prosecution will not call them, the Judge in his discretion may. *R. v. Simmonds* 1 C. & P. 84. *See* Phipson, p. 473. The right of cross-examination belongs to an adverse party and parties who do not hold that position should not be allowed to take part in cross-examination. 24 C. L. J. 149. A party cannot ordinarily cross-examine his own witness, nor can he impeach the credit of the witness called by him, except with the consent of the Court. *See* Ss. 154, 155, Ev. Act. A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness (S. 139, I. Ev. A.; O. 16, rr. 6, 15 and S. 94, Cr. P. Code). A witness whose examination has been stopped by the Judge before any material question has been put, is not liable to cross-examination. *Creevy v Carr*, 7 C. & P. 64.

Witnesses to character may be cross-examined. S. 140, Ev. Act. "Witnesses to the character of parties are in general treated with great indulgence,—perhaps too much. Thus, it is not the practice of the bar to cross-examine such witnesses, unless there is some specific charge on which to found a cross-examination, or at least without giving notice of an intention to cross-examine them if they are put in the box." Best, S. 262. Considerable latitude is allowed in cross-examination, and questions are not confined

to facts elicited in examination-in-chief or to strictly relevant facts. The accused are entitled in cross-examination to elicit facts in support of their defence from the prosecution witnesses, wholly unconnected with the examination-in-chief (41 C. 957). Questions irrelevant in examination-in-chief, may be relevant in cross-examination. The cross-examiner may undertake to show at some subsequent stage that questions apparently irrelevant are really relevant (S. 136). S. 138 says that both examination-in-chief and cross-examination must relate to *relevant* facts. "Relevant facts" in cross-examination must necessarily have a wider meaning than the term when applied to examination-in-chief. For instance, facts though otherwise irrelevant may involve questions affecting the credit of a witness and such questions are permissible in cross-examination. See Ss. 146—153, Ev. Act.

#### By accused

S. 138, Evidence Act, says "Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. "The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

"The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

Cross-examination, if properly conducted is one of the most useful and efficacious means of discovering truth. 19 B. 759. Where a witness called by one of the parties is a competent witness, the opposite party has a right to cross-examine him, though the party calling him has declined to ask a single question. 15 W. R. 134 Cr., 6 Bom. L. R. 88 (App). Where at a Sessions trial defence counsel applied for postponement of cross-examination on the ground that he had been unprepared for the evidence given and this was refused and the result was that the witnesses were not cross-examined. Held, that the accused was prejudiced by the refusal and trial was ordered. 41 C. 299. As a rule the proper time for the cross-examination of prosecution witnesses is at the commencement of accused's defence, but the Court may allow it at a later stage. 4 M. 130, 2 A. 253, 7 C. 28, 8 C. L. R. 325, 22 W. R. 44 Cr. If the accused did not cross-examine the prosecution witnesses immediately but applied for leave to examine them after the close of the case for the prosecution, the Magistrate can refuse the application if the Magistrate has decided to commit the case to the Sessions. 36 C. 48, 20 A. 264: 26 A. 177 and 21 C. 643, Dissented. Although new matter may be introduced in the re-examination, the prosecution is not entitled to examine-in-chief on the substantive case after the cross-examination. 1923 P. 116: 60 I. C. 662. It is not in the province of Courts to examine witnesses. The Court should leave witnesses to Pleaders to be dealt with as provided for under S. 138. Where the complainant or his Pleader was not permitted to examine the witnesses, held, it was a good ground for transfer. 1924 O. 371: 25 Cr. L. J. 1226. S. 138 deals not with the right of the party but the order in which proceedings are to be conducted 1929 C. 322: 125 I. C. 281: 31 Cr. L. J. 807. Where a witness dies after examination-in-chief and before cross-examination, the evidence is admissible but its probative value will be very small. 1925 M. 497: 48 M. 1: 93 I. C. 705, 1929 C. 822: 125 I. C. 281: 1933 L. 561: 34 Cr. L. J. 735. See 50 A. 113: 1928 A. 140, 5 C. W. N. 230 (n).

If opportunity is not offered for cross-examination even before charge the evidence is inadmissible. 1923 P. 53 : 24 Cr. L. J. 595, 1924 M. 735 : 81 I. C. 44, 1929 A. 236 : 117 I. C. 824, 11 Cr. L. J. 124 : 3 I. C. 374. Oral evidence is of little value without cross-examination. 5 P. R. 1903 Cr., 26 Cr. L. J. 1236 : 1925 O. 726, 17 C. W. N. 230, 1929 A. 236. Right of Counsel to ask witness to repeat whole story in cross-examination is doubted. 89 P. L. R. 1914 : 30 P. W. R. 1914 Cr. Statements transferred under S. 288 should not be read before accused was given opportunity to cross-examine. 3 L. 144 : 1922 L. 1 : 23 Cr. L. J. 513. The right of cross-examination given by S 138 is not fettered by the fact that there are Police papers which are referred to by the prosecution. It is not limited to matters raised in evidence. 12 Cr. L. J. 277 : 10 I. C. 917. In a warrant case until the stage provided for S. 256 is reached, the accused has no right to cross-examine and therefore the evidence of a witness given before framing of charge is not admissible under S. 33. 1929 C. 822 : 125 I. C. 281 : 31 Cr. L. J. 809. Admission in cross-examination that the accused is bad character is inadmissible. 9 Cr. L. J. 578 : 2 I. C. 349. Accused's counsel should not fill up gaps in prosecution evidence by his cross-examination. 1929 M. W. N. 365. The nature of defence can be ascertained not only from the statement of the accused but also from the trend of cross-examination and arguments. 1930 C. 442 : 127 I. C. 263 : 31 Cr. L. J. 1203. The evidence of a witness not recalled by prosecution when required by accused for cross-examination cannot be used to support the charge. 3 P. W. R. 1911 Cr. : 12 Cr. L. J. 35 : 9 I. C. 232. Parties cannot, without leave of Court, cross-examine a witness, whom the parties have already examined or declined to examine, and the Court has examined him. 11 B. H. C. R. 166. Evidence in S. 252 includes examination, cross-examination and re-examination of a witness. 1935 Sind 13 : 154 I. C. 762 : 36 Cr. L. J. 581, 8 C. W. N. 833, 1925 M. 989 : 49 M. 978. Cross-examination need not be confined to matters mentioned in examination-in-chief. (1871) 15 W. R. 34 Cr., 12 Cr. L. J. 277. Judge cannot shut out leading questions in cross-examination. It is illegal for a Judge to threaten witness with penalties of law. 14 A. 242, 8 A. 672. For further cross-examination after charge. See Prem's Criminal Practice 1947.

### **No Cross-examination by Counsel-Effect**

If the defence witnesses were not cross-examined by the Public Prosecutor and their evidence stands un rebutted, there is no reason why their evidence should not be believed. 1943 M. 590=44 Cr. L. J. 783. It must be accepted unless there are improbabilities. 1940 P. 683=19 P. 715, 1943 M. 69=44 Cr. L. J. 299.

### **Tendering Witness for Cross-examination**

The practice of tendering witness for cross-examination is inconsistent with S. 138 Ev. Act. Practice should be adopted in cases of witnesses of secondary importance and not in the case of eye witnesses, unless there is examination-in-chief there can be no cross-examination. Witness may be asked with the consent of the defence Counsel, whether his statement in the trial Court is true. 43 Cr. L. J. 328, 31 Cr. L. J. 1006=53 M. 69=1929 M. 906. Prosecution is not bound to tender a witness for cross-examination. It should only make a witness appear in Court, so that the accused may call him or not as he likes. 14 Cr. L. J. 245, 43 Cr. L. J. 529.

### **Reserving or Postponing Cross-examination**

There is no law for postponing cross-examination. If the application for postponement of cross-examination is reasonable one under the circum-

stances, the Judge should allow cross-examination to be reserved. 41 C. 299 till the examination of all witnesses, 11 Cr. L. J. 156.

#### Opportunity for Preparing Cross-examination.

If the witness is suddenly sprung upon the accused all of a sudden, sufficient opportunity should be given to accused to prepare his cross-examination 11 Bom. L. R. 1153, 41 C. 299, 43 Cr. L. J. 761. Court should inform the parties of the names of Court witnesses with a view to afford them opportunity of preparing cross-examination. 10 L. 790.

### CHAPTER 104

#### Re-Examination

The examination of a witness subsequent to the cross-examination by the party who called him should be called his re-examination. *See* S. 137, Ev. Act. The witness should be first examined-in-chief, then (if the adverse party so desires) cross-examined, (if the party calling him so desires) to the explanation of matters referred to in cross-examination. If a new matter is, by permission of the Court, introduced in re-examination, the adverse party may, further cross-examine upon that matter. *See* S. 138, Ev. Act.

It is irregular to allow a Public Prosecutor to examine-in-chief a witness who on being tendered for cross-examination, has been cross-examined by the defence. 1923 P. 115 : 22 Cr. L. J. 26 : 60 I. C. 662.

The party calling the witness has in re-examination the right to ask all questions which may be proper to draw forth an explanation of the meaning of the expression used by the witness on cross-examination, if they be in themselves doubtful and also of the motive or provocation which induced the witness to use these expressions, but he has no right to go further and to introduce matter new in itself and not pursued to explain either the expression or motive of the witness *See* Taylor, S. 1474.

If a witness admits on cross-examination that he has formerly made statement inconsistent with his testimony, if that fact be proved by independent evidence, the witness may be asked in re-examination to explain his motive for making such inconsistent statement. *See* Taylor, S. 1474.

If material question has been omitted in examination-in-chief, it cannot be asked as a matter of right in re-examination but the Court has a discretion to allow such questions subject to the condition that the opposite party is then allowed an opportunity to cross-examine the witness on the new matter. *See* S. 138, Ev. Act.

"The chief object of re-examination is to give the witness an opportunity to explain what he said on cross-examination. It is absolutely necessary, in many cases, to give a witness an opportunity after he has been cross-examined, to explain any statements which he may have inadvertently made while he was undergoing a severe cross-examination. And an advocate whose duty it is to re-examine a witness must be on the alert to note every point which requires an explanation.

If the advocate is skillful, he will not only re-instate the witness whom he has called, in the confidence of the Court and jury if it has been shaken by the cross-examination, but he will secure a repetition of the most important portions of the testimony of witness, and thus imprint it more firmly on the mind of the jury.



As a rule, in re-examination counsel should only touch upon matters brought out on cross-examination, and he must use great discretion in asking for explanation of what the witness stated on cross-examination. He should, before doing this be satisfied that the witness can explain satisfactorily, the apparent contradictions in his testimony, for it would be more hurtful to call for an explanation, and obtain one that is injurious, than to pass over in silence the point not susceptible of explanation. After a witness has emerged from the fiery furnace of cross-examination, if we may use the expression, the probability is that he has been scorched, and that he is not in a very happy frame of mind, and the total or partial destruction of the testimony of his witness is not calculated to improve the good humour of counsel himself; therefore he must guard against showing the slightest sign of being disconcerted or dumbfounded at the ravages made in his case by that most dangerous and destructive engine, cross-examination, but he must proceed with the greatest coolness and patience to repair the damage which has been done him. Before beginning his re-examination, counsel should determine, in his own mind, what fact brought out in examination-in-chief has been contradicted in answer to the questions of his opponent. Having in this manner taken a survey of the situation, he should as nearly as possible, begin to repair the damage in the order in which it was done. We take it for granted that the counsel has paid the strictest attention to the cross-examination, and that he is, therefore, able to proceed in the work of repair as the destroyer proceeded in his work of destruction." See Wrottesley, *Examination of Witnesses*.

Sir Frank Lockwood, regarding re-examination, says :—

"Re-examination—the putting Humpty-Dumpty together—was by no means an unimportant portion of an advocate's duty. Once, in the Court of Chancery, a witness was asked in cross-examination by an eminent Chancery leader, whether it was true that he had been convicted of perjury. The witness owned the soft impeachment, and the cross-examining counsel very properly sat down. Then it became the duty of an equally eminent Chancery Q.C. to re-examine. 'Yes,' said he, 'It is true you have been convicted of perjury. But tell me : Have you not on many other occasions been accused of perjury, and been acquitted?' He recommended that as an example of the way in which it ought not to be done."

If the testimony of your witness has not been shaken upon cross-examination, and there is nothing that should be explained, or nothing forgotten in your examination-in-chief, dismiss the witness. Avoid re-examining as to trifling matters; besides taking up the time of the Court and jury unnecessarily, the jurors may give undue weight to things of no importance which you dwell upon at length. If an answer favourable to your side has been brought out on cross-examination, don't press the witness to re-state; you can comment upon it when you argue your case to the jury. If your witness has been completely broken down upon cross-examination, and has involved himself in hopeless contradictions, hope nothing from him, but get rid of him as soon as possible. If, however, there is a chance to set him on his feet, do it. If he has given an account of transaction susceptible of more than one construction, aid him in giving the real character of the transaction, by asking suitable questions. If his credibility has been assailed, re-establish it if possible, for the whole of his testimony rests upon that foundation. The chances are that if questions have been asked a witness which have a tendency to impeach his credit he will be anxious to explain, and the jury will be apt to sympathise with him, and to feel relieved when he has given a

satisfactory explanation of some transaction involving moral turpitude with which counsel cross-examining him sought to connect him. It is dangerous to cross-examine as to character unless the advocate asking the questions has good ground for making his attack upon the witness. Counsel should be careful not to let in new matter upon re-examination and thus afford the opposing counsel the opportunity to re-cross-examine. While upon re-examination the advocate has not the right to ask questions upon matters which have not been brought out in the examination-in-chief, or cross-examination, without the permission of the Court being first asked and obtained, it may be that opposing counsel will not object to the introduction of the new matter, preferring to claim the right to re-cross-examine. It is sometimes very unwise to object to a question where the answer is not very damaging, for the reason that the jury will suspect that some fact has been withheld which the party objecting wished to keep back, and they will always exaggerate its importance. Jurors love to have all the lights turned on, and they are apt to suspect that a litigant who wishes to hide behind a technical objection, especially if he does it often, is unworthy of their verdict. Counsel should not have such an itch to re-examine as to disturb the case he has already made. His preparation of the case should always be so thorough as to leave nothing unproved by his direct examination and, as we have said he should carefully abstain from asking question upon comparatively unimportant matters. He should let well enough alone. We have known many advocates get into deep water by not doing this. After proving their case clearly, they were not satisfied with their performance, but were determined to kick their assailant after he had been knocked down. The foolish course of such advocates reminds us of that of the Italian whose experience was embodied in the epitaph upon his tombstone, which read as follows; "I was well, I wanted to feel better: I took physic, and here I am." The counsel who is to re-examine should be so entirely familiar with the testimony of the witness in his case that he will be in no danger of leaving anything unexplained. The remarks of Mr. Reed upon this point are worthy of insertion here. He says: "We have said that one purpose of cross-examination was to avoid the garbling of the testimony that could always be ingeniously done on the examination-in-chief. And the great reason of the re-examination is to prevent a like garbling by the cross-examining counsel. The cross-examination cannot only deeply probe the witness as to his feelings, his bias, his means of knowledge, but it can also elicit from him independent facts favourable to the examiner. And by reason of the right of the counsel to confine the witness to answer the questions, and to permit him to give nothing else, only a portion of the truth may be so presented as to impart falsehood. Thus a witness who has testified in examination-in-chief to an occurrence, may be asked in cross-examination if it were not night, and answering affirmatively, he may stand somewhat discredited until the re-examination draws out that there was a good-light, by which he could see clearly." The re-examination should be confined to matters arising out of the cross-examination, and ordinarily the counsel will not be allowed to question the witness on new matter which could have been asked in examination-in-chief. If it is desired to introduce new matter in re-examination, the counsel should in every instance seek the permission of the Court. The Judge, however, may in his discretion allow such a question to be put. 8 Q. B. D. 506. In 2B & B. p, 297, Lord Tenterdon said:—"I think that counsel has a right upon re-examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and

also of the motive by which the witness was induced to use those expressions ; but I think has no right to go further, and to introduce matter new in itself and not wanted for the purpose of explaining either the expressions or the motives of the witness." Thus, where a certain conversation had been admitted in cross-examination, re-examination as to distinct matters occurring in that conversation will not be allowed : 7 A. & E. 627.

The Court has always the power to recall a witness at any stage of the proceedings. (See O. 18, r. 17, C. P. Code) and to put any question it pleases, in any form (s. 165). If the examination of the witness has been conducted unskilfully the Court usually examines a witness at the close of the examination, i. e., after re-examination. There is no right of re-examination after the interrogation by Court.

The proper office of re-examination (which is often inartistically used as a sort of summary of all the things adverse to the cross-examining counsel which may have been said by a witness during cross examination) is by asking such questions as may be proper for that purpose so as to draw forth an explanation of the meaning of the expressions used by the witness in cross-examination, if they be in themselves doubtful ; and also of the motive, or provocation which induced the witness to use those expressions ; but a re-examination may not go further, and introduce matter new in itself and not suited to the purpose of explaining either the expressions or the motives of the witness. See Taylor, S. 1474. Speaking of re-examination it may incidentally be remarked that if your witness's testimony has not been shaken by the adversary, leave well alone. "It is in such case, a mistake to try to improve matters in re-examination, and the attempt is apt to lend weakness instead of strength to the sum total. If your witness has really come to grief under cross-examination, it is hardly possible, by re-examining him, however artfully, to put him on his feet again. Humpty-Dumpty has fallen, and as he falls he must be left to lie. It is only, I think, where your witness has given answer in cross-examination, through flurry or inadvertence or misapprehension, which would damage your case if left unexplained or not modured, that tactful re-examination may be really helpful and effective. Never unnecessarily introduce new matters in re-examining witness. To do so, opens the door to re-examination and you cannot tell where or how things may end ! Cr. L. J. 208. The above rules can be illustrated thus :—

### Illustrations.

(i) The object of the cross-examiner in this case was to show that the petitioner who was a solicitor, was as unfaithful to his wife as he alleged his wife had been to him.

"Ask him," whispered the wife's solicitor to his counsel in the course of the cross-examination of the petitioner, "whether he is not a frequenter of Corporation Street."

Counsel asked, "Now, Sir, attend to me if you please. Are you not a frequenter of Corporation Street ?" The witness smiled.

"It is no laughing matter, Sir," said the counsel. "Do not lounge in the witness-box like that ; it is not respectable to the Court. I ask you again, are you not in the habit of frequenting Corporation Street ? You know what I mean, Sir just answer the question."

The petitioner, with the blindest smile of innocence, answered, "Yes."

The petitioner who was merely represented by a junior, re-examined. This was his re-examination:— Q. "You say you are a frequenter of Corporation Street?"

"Yes, Sir."

Q. "Can you say whether Her Majesty's Judges are also in the habit of frequenting that neighbourhood? (Here, of course, was much laughter, in which the judge indulged as freely as any). Have you seen them there yourself?"

A. "Many a time, Sir."

Q. "Is it not the finest street in Birmingham?" A. "It is, Sir."

Q. "And is it not there that the Royal Victoria Courts of Justice are situated?" A. "Yes, Sir."

Q. "And where the Assizes are held."

A. "It is." The effect of the question and answer was completely nullified by this re-examination.

(ii) A witness was questioned by an inexperienced counsel thus:—

Q. "Have you not been convicted of felony?"

A. "Must I answer, my Lord?"

"I am afraid you must" answered his Lordship. "There is no help."

A. "I have."

In re-examination the witness was asked "When was it."

A. "Twenty-nine years ago."

The Judge—"You were only a boy—"

Witness—"Yes, my Lord."

Cox's Advocate.

Don't cross-examine in such a manner as to give room to *effectual re-examination*.

Sometimes through small opening in cross-examination a large and effective re-examination may gain admittance. See Harris' Illustrations in Advocacy, p. 107.

For illustrations see separate chapter on "Do not Cross-examine as to Give Room to Effectual Re-examination."

### Cross-examination in Re-examination

1. Where a witness unexpectedly turns hostile on cross-examination, the Court can permit the party producing the witness to challenge by way of cross-examination the veracity of the witness. 42 C. 967, 6 C. W. N. 513.

2. Where prosecution tenders a witness as being "won over" without examining him, the prosecution is not entitled to cross-examine the witness after he has been cross-examined by the defence. 1928 P. 203: 7 P. 55.

A cross-examination of witness often gives rise to a re-examination of him by the side which examined him in chief. One object and effect of the re-examination may be to repair the damage, which the cross-examination has done to the evidence given in chief.

When a cross-examination has brought out some fact, not contained in the evidence in chief, a re-examination on that fact is, in reality, a

cross-examination, and a further examination following this cross-examination will be a re-examination, and this may confirm the original or first cross-examination.

### Illustration

The trial in 1794 of Hardy for high treason contains an instance of this, in the following cross and further examination of the witness, Green. Cross-examined by Mr. Erskine.

Q. "Did you tell Groves that you had sold two or three hundred knives, but desired him to speak low, because the parlour-door was open, and your wife was a damn'd aristocrat—did you say so?"

A. "I will make oath that I did not make use of such an expression as that."

Q. "Did you say anything to him, as if there was anything improper in selling the knives?"

A. "No."

Q. "I think it right to inform you, that Groves has thought fit to swear that you told him to speak very low, for that your parlour-door was open, and your wife was a damn'd aristocrat, and that you did not want her to know, that you were selling the knives."

A. "I swear I said no such thing; these knives all lay in my shop; so far from hiding them from my wife, they lay openly in the show-glass and in the windows for sale."

Re-examined by Mr. Attorney-General (Sir John Scott).

Q. "To be sure, it is not a polite thing to call one's wife a damn'd aristocrat; what did you say about her?"

A. "I do not recollect that I said a word of the kind or threw out any such hint."

Q. "Did you say anything about your wife?"

A. "I do not recollect, to the best of my knowledge, that I mentioned anything about my wife."

Q. "Did you mention anything about aristocrats?"

A. "No, I do not know that I said anything about aristocrat or my wife."

Mr. Erskine. "Did you wish to conceal these knives from your wife?"

A. "No." See Hardy's Trial, Vol. III, pp. 118—120.

### Re-examination without Cross-examination

It is well settled that there can be no re-examination when there is no question put by the opposite party in cross-examination. The party calling the witness cannot contend that he expected certain questions to be asked by the opposite counsel and therefore he omitted to ask these questions. This happened in an important case, the facts of which were as follows:—

In this case the question was whether the accused was sane or insane at the time of the commission of the offence, One Dr. Hamilton had been retained by the defence and had made a special study of the accused's case, had visited him for weeks at the prison, and had prepared himself for

a most exhaustive exposition of his mental condition. Upon calling him to the witness-chair, however, counsel for the accused (Mr. Howe) did not question his witness so as to lay before the jury the extent of his experience in mental disorders, and his familiarity with all forms of insanity, nor develop before them the doctor's peculiar opportunities for judging correctly of the prisoner's present condition. The advocate evidently looked upon the advocates in charge of the prosecution as a lot of inexperienced youngsters, who would cross-examine at great length and allow the witness to make every answer tell with double effect when elicited in cross-examination by counsel for the Crown. Counsel for the accused contented himself with these two questions and answers:—

Q. "Dr. Hamilton, you have examined the prisoner at the Bar have you not?"

A. "I have, Sir."

Q. "Is he, in your opinion, sane or insane?"

A. "Insane," said Dr. Hamilton.

"You may cross-examine," thundered the counsel with one of his characteristic gestures. There was hurried consultation between the advocates for the Crown.

"We have no questions," remarked Mr. Nicoll, quietly.

"What," exclaimed Howe, "not ask the famous Dr. Hamilton a question? Well, I will," and turning to the witness began to ask him how close a study he had made of the prisoner's symptoms, etc., when upon objection by the counsel for the prosecution, the Court directed the witness to leave the witness-box as his testimony was concluded, and ruled that, inasmuch as the direct examination had been finished, and there had been no cross-examination, there was no course open to Mr. Howe but to call his next witness.

#### *Re-establishing Credit*

(i) Following is an example in which re-examination served to re-establish the testimony of a character witness which had been badly damaged by cross-examination.

Q. Defendant's reputation is bad for truth and veracity? A. Yes.

Q. Well, who did you hear say he was untruthful? A. I heard Blasek say it and Jost.

Q. Who else?

A. I can't think of any more just now.

Q. How long have you known the defendant? A. For a long time, ten years I would say.

Q. What is the population of this country? A. Oh, about 200,000 people.

Q. Then your testimony amounts to this. Out of the 200,000 people living in this country and over a period of ten years, you can recall only two persons who had spoken ill of this defendant? A. That's right.

The opposing counsel in re-examination asked the following questions:

Q. How many people in all have you ever heard at any time making remarks or speaking about the defendant's reputation? A. Two.

Q. And both of those thought his reputation bad? A. Very bad indeed.

(ii) Re-examination was used to offset the cross-examination in the Hauptmann trial. By means of inferential questions. The jury was led to believe that Dr. John (Jafsie) Condon had been examined on various times by alienists and was mentally unsound. In order to repeat this inference the Crown Counsel asked the following questions in re-examination:

Q. So far as you know, Dr. Condon was never examined by men of your department? A. No.

Q. Did your investigation show he was considered eccentric in the Bronx? A. No.

Q. Did your investigation show he sometimes dressed as a woman and masqueraded in the neighbourhood? A. No, it did not.

Q. Did your investigation show that parents of Girl Scouts and Boy Scouts objected to Dr. Condon's presence at meetings? A. No.

Q. Did your investigation reveal why Dr. Condon was transferred from a New York School? A. No, it did not.

Q. Then your investigation was not very complete, was it? A. I think it was.

Q. You found that Dr. Condon had spent his entire life in the Bronx? A. Yes.

Q. Your investigation revealed he was well known in the Bronx? A. Yes.

Q. Is it not known that Dr. Condon was known through the Bronx as a patriotic citizen interested in civic affairs? A. Yes.

## CHAPTER 105

### Some Rules of Evidence

For full commentry and case law, See Prem's Criminal Practice 1947,

#### *Relevancy of Facts*

S. 5, Ev. Act.—Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

*Explanation.*—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

S. 6, Ev. Act.—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

S. 7, Ev. Act.—Facts which are the occasions, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

S. 8, Ev. Act.—Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or

relevant fact, and whether it was previous or subsequent thereto.

*Explanation 1.*—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

*Explanation 2.*—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

S. 9, Ev. Act.—Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, or relevant in so far as they are necessary for that purpose.

S. 11, Ev. Act.—Facts not otherwise relevant are relevant—

- (1) if they are inconsistent with any fact in issue or relevant fact,
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

S. 12, Ev. Act. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

## *II. Hearsay Evidence (See Chapter 43)*

S. 60, Ev. Act.—Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

## *III. Secondary Evidence.*

S. 65, Ev. Act.—Secondary evidence may be given of the existence, condition or contents of a documents in the following cases:—



(a) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in S. 66, such person does not produce it ;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(d) when the original is of such a nature as not to be easily movable ;

(e) when the original is a public document within the meaning of S. 74 ;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

S. 66, Ev. Act.—Secondary evidence of the contents of the documents referred in S. 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [or to his attorney or pleader], such notice to produce it as is prescribed by law : and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case :

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

(1) when the document to be proved is itself a notice ;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it ;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force ;

(4) when the adverse party or his agent has the original in Court ;

(5) when the adverse party or his agent has admitted the loss of the document ;

(6) when the person in possession of the document is of reach of, or not subject to, the process of the Court.

For the case law and commentary see Prem's Laws of India pp. 3871—3879.

#### IV. Character Evidence (See Chapter 92).

S. 52, Ev. Act.—In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

S. 53, Ev. Act.—In criminal proceedings the fact that the person accused is of a good character is relevant.

S. 54, Ev. Act.—In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character in which case it becomes relevant.

*Explanation 1.*—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

*Explanation 2.*—A previous conviction is relevant as evidence of bad character.

S. 55, Ev. Act. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

*Explanation.*—In Ss. 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but, except as provided in S. 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

For the case law, see Prem's Laws of India, p. 800, and Prem's Criminal Practice.

#### V. Exclusion of Oral by Documentary Evidence

S. 91, Ev. Act.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

*Exception 1.*—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

*Exception 2.*—Wills admitted to probate in British India may be proved by the probate.

*Explanation 1.*—This section applies equally to cases in which the contracts, grants or disposition of property referred to are contained in one document and to cases in which they are contained in more documents than one.

*Explanation 2.*—Where there are more originals than one, one original only need be proved.

*Explanation 3.*—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

S. 92, Ev. Act.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement shall be admitted, as between the parties to any such instrument or their representative in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms :

*Proviso (1)*—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto : such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

*Proviso (2)*—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

*Proviso (3)*—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

*Proviso (4)*—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

*Proviso (5)*—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved :

Provided that the annexing of such incidents would not be repugnant to, or inconsistent with, the express terms of the contract.

*Proviso (6)*—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

S. 144, Ev. Act.—Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

*Explanation.*—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

VI. *Privileged Communication.* (See Chapter 52)

VII. *Leading Questions.* (See Chapter 25).

S. 141, Ev. Act.—Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question,

S. 142, Ev. Act.—Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

S. 143, Ev. Act.—Leading questions may be asked in cross-examination.

### *VIII. Impeaching Credit of Witness* (See Chapter 92).

S. 155, Ev. Act.—The credit of witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence ;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

*Explanation.*—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

S. 153, Ev. Act.—When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him ; but, if he answers falsely, he may afterwards be charged with giving false evidence.

*Exception 1.*—If a witness is asked whether he has been previously convicted of any crime and denies, evidence may be given of his previous conviction.

*Exception 2.*—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

### *IX. Refreshing Memory*

S. 159 Ev. Act.—A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct. Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document :

provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

S. 160, Ev. Act.—A witness may also testify to facts mentioned in any such document as is mentioned in S. 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

S. 161, Ev. Act.—Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

X. *As to Production of Documents.* See O. 13, R. 1, C. P. C. O. 13, r. 2, C. P. C., O. 7, r. 14, C. P. C.

S. 162, Ev. Act.—A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court. The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility. If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and if the interpreter disobey direction, he shall be held to have committed an offence under S. 166 of the Indian Penal Code.

S. 163, Ev. Act.—When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

S. 164, Ev. Act.—When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

For further commentry on the subject See Prem's "Laws of India," pp. 1391 to 1395 and pp. 3322 to 3324.

XI. *Objection to Admissibility of Evidence* (See Chapter 32).

See Prem's "Laws of India" pp. 1569—1572.

# Argument

## CHAPTER 106

### General Rules Regarding Arguments

**Qualifications of a lawyer.**—It is true that lawyers are born and not made, yet there are certain limitations to that rule. It has been seen that many lawyers of average intelligence and capabilities have risen to eminence by dint of their hard labour.

One who goes from Court to Court cannot but observe the varying quality of law practice, a variation wider perhaps than in any other profession. It ranges from the delicate, masterly skill of the legal artist down to the work of the ignorant bungler who knows but little of the facts or of the law of the cases he tries and even less of human nature. A law suit in many Courts is not the scientific work of trained and skilful specialists but too often is the crude performance of the inexperienced and the unfitted. As a rule the surgical clinic shows the skilled work of trained men; but the Court house often shows the bungling efforts of the unskilled. For every lawyer now and then to try important cases in the law Courts is as if every doctor attempted on rare occasions to perform major operations. The legal operating room shows many mangled legal corpses. In the old days American bar was well known for much cheap, hair splitting, insincere oratory; and the country people came from far and wide to hear the lawyer "sum up." Noisy arguments were the order of the day. The cast iron rule observed in those days can be summed up in the following words:—"If you have got a week case, abuse your opponent."

**Advocacy.**—Advocacy has undergone complete change in modern times. Words, however, still furnish the principle medium by which mind communicates with the mind but they are now used in Courts rather to persuade than to thrill and to inform rather to impress. There was time in the old days when the lawyer adorned his address with high sounding latin phrases which of course he used not to convey ideas but to impress his auditor. Happily this practice is fast declining. A lawyer has got a very solemn task in the performance of his professional duties towards his client. There is no other relation in human affairs exactly analogous to that of a lawyer and client. "It is a relation that in its intimacy and responsibility is an example of the supreme trust and confidence. By it we ask another for the time and the occasion to be ourselves. It is as if for the time being we transfer our individuality to another who thus becomes our mind, our voice and even in a degree our conscience. To violate this sacred duty and be disloyal to client is deservedly unpardonable sin of an attorney. By this betrayal he sinks lower than by any other act of dishonour." *The Problem of Proof* P. 69.

Prominent among the distinguishing characteristics of a good lawyer are a uniform love of order and decorum, tireless attention to every detail requisite for the preparation and conduct of the causes committed to his charge; a thorough mastery of the legal principles involved, a clear conception of the moral, social and political environment of the controversy, a readiness to meet any phase or difficulty developed during the progress of the

trial, a diagraphy of unusual beauty, a courtesy to Judge, advocate juror, which elevates the hearing above the common level, a calm logic which carries conviction and accomplished oratory which charms while it persuades, a power of sarcasm which when provoked is exercised with withering effect, a demeanour which dignifies the Court room and is a standing rebuke to everything having a tendency to belittle time and place. He should possess a marvellous and forceful personality and should never forget the proprieties even under the greatest stress of circumstances, choice in thought and expression, he should refrain from offending his mother tongue by the use of even questionable language—slang he must utterly repudiate. He should carry about him at all times and places an air of refinement, of self possession and of reserved power which exacts the utmost respect. He should never permit himself to become excited and should always preserve his intellectual and emotional balance. In the heat of arguments his eyes and countenance should be radiant with an intellectual luminosity which rivets the gazes and electrifies the soul of the beholder. His attitude, his voice, his action, his eye-glasses, his pocket handkerchief, be instinct with eloquence. By false colouring of law he should scorn to influence the mind of the doubtful Judges. His conception of dignity and his calling, his respect for truth and fair dealings, and his regard for his fellowmen suffer at his hands no such tokens of demoralization. He should be indeed a brilliant type of a thorough gentleman, an accomplished advocate, a wise counsellor and a profound lawyer. Fidelity to Court, fidelity to client, fidelity to the claims of truth and humour, fidelity in all the relations of his life, he must sedulously cultivate and uniformly exhibit. 26 *American Law Reporter* 165.

The lawyer does not create the truth, nor, indeed, invent it, but he carries the torch that lights up the road that leads to the truth. He does not render the final decision which brings justice to men, but he wields the baton of reason that persuades the mind that renders the decision. He is clothed with no official power, but it is his hand that presses the key that quickens the conscience of the tribunal which wields the power. In the discharge of his duties he comes into touch with all classes and all conditions. He is the trusted conservator of the millionaire's millions; he is the champion of the poor man's plight the weak, oppressed, and strong barrier against the aggressions of mighty unjust, in him is reposed the confidence of all mankind. 26 *American Law Reporter* 434.

All lawyers are men, and no man is perfectly pure and many men are foul, and foulest man is the foul lawyer. But it is lawyer's opportunity, by conscientious devotion to the duties of his high calling, to grow up to the stature of the highest development afforded by our civilisation, and illustrate in his life the splendid possibilities of our nature and to prove by his work that in the front rank of the grand galaxy of noble souls of our race proudly stands the noble lawyer. 26 *American Law Reporter* 434-435.

The first requirements of the great lawyer are a good working conscience and a strong personality. Added to these in the great advocate is what, for a better description we call a ready, working knowledge of human nature. Other important, if not essential, qualities are the ability to understand facts, an analytical, alert mind, and a forceful command of language. The three qualities of personal reputation and professional ability are fused in a lawyer and naturally are the main elements that constitute his ability as a lawyer. The great trial lawyer, though not necessarily a great orator, must be able to use language to produce results as a skilled craftsman uses a delicate and complicated tool. He must have sympathy, tact and

courtesy and must know men and their ways. By study, experience and a trained intuition, he will also have acquired an instant appreciation of the significance and force of evidence and will have learned its correct order of presentation. He must be able to control his temper and maintain his poise under trying conditions and it will steady him and keep him sane if he has a sense of humour, which, however, he can hold in proper subjection. Finally he must know the law.

In its widest sense the art of legal advocacy is the art of so presenting a case to a tribunal in writing or in speech as to secure if possible a desired decision. I should be disposed briefly to call it "The Art of persuasion," the earliest classic definition of rhetoric, were it not that Quintilian that great master of art science, protests that his definition is both too wide and too narrow. And besides, there is perhaps truth in the criticism that it suggests that to persuade at any price is the aim of the advocate, a view certainly open to serious ethical objections. Subject, however, to all reservations on the score of morality, a topic which I am not going to discuss on this occasion, I think we may accept the statement of the Greek Grammarian. Apollodorus that the first and all important task of forensic oratory is "to persuade the Judge and lead his mind to the conclusions desired by the speaker."

If I were to select the rule which in my estimation above all others should govern the presentation of an argument in Court, it is this—always keep steadily in mind that what the Judge is seeking is material for the judgment or opinion which although the case he knows he will inevitably have to frame and deliver at the end. He is not really interested in the advocate's pyrotechnic displays: he is searching all the time for the determining facts and the principles of law which he will ultimately embody in his decision.

I remember a friend of mine on the Bench once discussing with me the advocacy of a certain Counsel. He came into Court briskly, spoke well and vigorously and at reasonable length, and indeed exhibited all the outward evidence of what is known as "a good appearance." He left the Court receiving the congratulations of his junior and the thanks of his client. All seemed well. "But", said the Judge, "When I came to write my judgment in my study at home that night I found I had a blank note book. The speech apparently so successful had contributed just nothing to assist me in my task on analysis I found it to consist chiefly of robust common places and confident assertions." On the other hand how often a halting address, delivered with every fault of manner and diction but manifestly the result of careful thought and thorough researches will command the respect of the Bench and provide the Judge with the very material he wants. Counsel's task is to help the Court to reach a decision in his clients favour. I used always to have before me the vision of the Judge sitting down at his desk to write his judgment often all the stir and excitement of the debate was over.

Extreme propositions confidently advanced at the Bar do not help him then. He wants the clear phrase, the moderately stated principle, the dispassionate array of facts which may appropriately find a place in his judicial finding. It is a good exercise to think out how, if you were the Judge and not the advocate of your clients cause, you would yourself frame a judgment in your client's favour. Then model your speech on these lines. You will be surprised to find how often the grateful Judge when he comes to give judgment in will adopt the very words of an argument so presented, you have furnished him with the materials of judgment;



he will be predisposed to use them because they are at hand and the more so if your opponent has adopted a less helpful though possibly more showy method of advocacy. After all, the problems of pleading are all the problems of Psychology. One mind is working on another mind at every point and all the time. The Judicial mind is subject to the laws of Psychology like any other mind. When the Judge assumes the exmine he does not divest himself of humanity. He has sworn to do justice to all men without fear or favour, but impartiality which is the noble hall mark of our Bench does not imply that the Judge's mind has become a mere machine to turn out decrees; the Judge's mind remains a human instrument working as do other minds, though no doubt on specialised lines and often characterised by individual traits of personality, engaging on the reverse. It is well, therefore, for the advocate not only to know his case but to know his Judge in the sense of knowing the type of mind with which he has to deal. (*Vide Problem of Proof*).

*Language.*—The use of words as a means of producing results is one of the most important parts of the business of a lawyer. But it must be language timed, controlled and saturated with ideas. When thus timed and saturated, words may strike like a hammer, pierce like a stiletto or soothe like a mother's lullaby. Words are more important as a part of a lawyer's equipment than his diploma or his library. To him language is both a weapon and a shield. Ideas naturally must come first, but words are his tools. It is only by them that he can give his ideas life, and it is through them that he achieves success. Words represent ideas, and even the beginner knows that the planting of ideas is the important part of the lawyer's business. There is in fact no other kind of planting that he can do that is so sure to bring valuable returns. This is a phase of his qualifications in which he can constantly improve himself, and the lawyer with the student spirit develops a keen interest in words, in idioms and in phrases. His eye and his ear are constantly being trained and all the time he adds to his stock of words from which on occasion he can instantly draw. The command of a new word is an addition to his equipment and carries him nearer to what he, like other mortals, never quite achieves perfect expression.

*Accuracy.*—Accuracy of expression should be his guiding principle. Accuracy is the twin brother of honesty; inaccuracy of dishonesty. Accuracy of statement is one of the first elements of truth while inaccuracy is skin to falsehood. The lawyer should cultivate a clear, pleasant and upright style. Lucidity of expression, and orderliness of expression make the style. He should state the points tersely and accurately without any rhetoric and redundancy. The whole scheme of the work should be carefully thought out and skilfully executed. Systematic arrangement of definite classification should be his passion, and should prelude the whole range of his address. To be clear and concise and convey one's meaning in pure and simple speech, is a branch of the advocate's art which is important at every stage of a case. For the more plain and free from ambiguity the language, the greater its power to convey the speaker's meaning direct to the mind of the audience. Long drawn out words and sentences, on the other hand, are apt to divert his attention from what one wishes to be understood, to the words themselves. Now the object of speaking is to make one's listener mentally grasp the facts. The speech or the words employed are the conduit pipes of the thoughts and that being their sole function, one must be careful to prevent any of that attention one is so anxious to obtain, being diverted. When curious or unusual phraseology is employed, the danger arises lest the hearer should devote any of his attention to the words themselves or lest he should, in the difficulty

of attempting to grasp the meaning of your expressions, lose all sight of the thoughts you desire to convey by them. As perspicuity therefore always tends to promote obscurity, it is advisable to use short sentences instead of long periods. It being one's object to be clear, ambiguity should be avoided as one's greatest enemy. Though this is a fault which is perfectly patent to the most casual observer, it is constantly committed by those even of the greatest experience.

*Fluency.*—Fluency of speech is a *sine qua non* for the demon of success. Although it is a purely natural quality yet it is capable of attainment. It often happens that the man who possesses good ideas and capability of expressing himself in the most correct language is incapable of speaking his thoughts. His hesitation and tardy delivery diverts the attention of his hearers from the subject he is dealing to his own embarrassment and humiliates the sense and weakens the force of his own arguments by constant delays and interruptions for the purpose of choosing his words. In acquiring fluency two methods are recommended; *Firstly*, the lawyer should notice the faults of others; and *secondly*, he should mix with people who possess ready tongue and lively imaginations. It is essential that debating societies should furnish the training ground for readiness in speech. It is very unfortunate that there are no debating societies in India to train the young lawyer in the art of advocacy. Eloquence is logic on fire. It is the transference of thought and emotion from one heart to another no matter how this is done. Talking and eloquence are not the same things. To talk and to speak well are two different things a fool may talk but a wise man speaks. The golden rule should always be borne in mind that true eloquence consists in saying all the thoughts properly and nothing more. Let not the prominent points be caluded in the oratory and eloquence of the lawyer. His main task should be to impress the essential points with vigour and clarity.

*Delivery.*—Delivery is everything in speech. The tone of voice, looks and gestures interpret one's thoughts and feelings no less than words do; in fact the impression produced by these is frequently much stronger than any that words alone can make. Words are mere conventional symbols, it is the manner and action of the face, the features, and the whole frame, that produce the most vivid impressions. If the advocate really feels what he says, then there will, as a rule, be no necessity to adopt any studied mannerisms, for what comes natural to him will appear most natural to his audience. This is tantamount to saying that the advocate, if he hopes to attain any success, must be earnest in his work. If he have no love for his profession he can never hope to be anything but a failure and he should lose no time in turning to some pursuit more congenial to his tastes and nature. If the advocate is truly earnest in a cause, his earnestness and warmth will communicate themselves naturally to his hearer for he will be regarded as the impersonation of his client, he will appear to stand in his shoes and to have taken upon his shoulders the complete charge of the client's interests. One may imagine the bad impression that would be produced if a client, appearing in person, were to advocate his cause in an indifferent manner and with the air of being careless of the result of his case. An advocate or pleader who acted in a similar manner would be taken to admit that he had a bad case and his very lukewarmness would make the Court believe that he had no faith in the matter he propounded. The natures of advocates and their audiences, however, differ and there are exceptional cases where the advocate must call a little art to his aid, however earnest he

may himself feel. The reason may be due either to the naturally cool and phlegmatic disposition of the advocate, or the possession of the opposite quality by the Court. The Judge who has a lively temperament will not be roused by the lethargic countenance of a cold-blooded speaker whose very air tends to cool the judgment and cramp the imagination. With such speakers, whose mode of speech, even under the most exciting circumstances, would never overstep the grounds of cool judgment some little aid must be drawn from the science of rhetoric, and for the benefit of their clients, they must borrow those plumes of outward emotion with which nature has left them unendowed. Common sense must, however, guide one to keep within proper bounds, and especially in simple or insignificant cases, where a flashing eye or the appearance of being deeply affected would ruin one's client. In the early steps of their professional career practitioners will experience the crushing sense of awe which inspire them on first addressing a Court. So great is the feeling of solemnity with some, that they appear unable to shake it off. It becomes a second part of their nature and ripens into a heavy pompous style. Now it is very proper to show the greatest respect for the Courts but when one remembers that one's duty is to instruct and persuade Judges and not to send them to sleep, it will be readily admitted that a middle one between heaviness and levity should be chosen, care being taken neither to disgust by an ill-timed affected pomp of expression nor to offend by vulgarity or rudeness.

**5. Emphasis on important facts :—** The object of argument is to impress the mind of your hearer as vividly as possible. Emphasis should be laid on the main words which go in your favour: To take an instance: You have established an important fact during your cross-examination that A had a "*dao*" in his hand. The evidence of the witness was "I saw A sitting on a charpoy; he had some green mangoes which he was peeling with a *dao*." As you come to the point, the picture is in your mind, you see A sitting on a charpoy peeling green mangoes with a *dao*. Four facts are apt to intrude themselves upon you, — (1) that he was sitting; (2) on a charpoy; (3) that he was peeling green mangoes; (4) that he had a *dao* in his hand. The last fact is that which you wish to impress vividly upon the mind of your hearer. You would therefore confine yourself to that point and make no mention of the others. If you were to repeat the witness's answer verbatim, the effect of the statement that he had a *dao* would be clouded over by the other three points. Your hearer might even be in doubt as to what you wished to establish from the witness's answer, or to which of the four points you wanted to draw his attention. So, if you wished to attack the witness's statement by showing that green mangoes were not to be had at the time of the year to which he speaks, and the other points were not material, you would confine yourself to saying that he was not to be believed because he had sworn that A was peeling green mangoes, when it was absolutely impossible that he could have had them. In the latter case the introduction of the other matters, *viz.* of his sitting on a charpoy, or his having *dao* in his hand, would only confuse the matter it was your object to bring out in strong relief. It might at such a time flash across one's mind that the witness must be wilfully telling a falsehood because he gave so particular a description of what A was doing, that he could not have been simply making a mistake as to the mangoes, as might be urged by the other side. It might

appear as a new and forcible argument, supporting your contention that the witness was lying as to all that statement of his, and that his wilful attempt to give such a complete description of A, stamped him as a skilled and dangerous perjurer. But these arguments should not be allowed to intrude upon your plain point that A could not have had mangoes; your memory should be trusted not to lose sight of the new and additional arguments that had struck you, or they should be noted down so that use might be made of them in their proper place.

**Prefatory Remarks:—** No matter should be introduced in the arguments without some prefatory remarks to inform and prepare the mind of the judge for what is to follow. A counsel should always say: "My Lord, my next point is with regard to unsatisfactory identification of the person." Then he should read the evidence and marshal all facts to establish that witnesses had opportunity to see the accused person before the identification parade, the number of persons mixed with the person was too small, the person had some distinguishing marks, that some of the Police men were near about at the time of the identification parade and so on. If his next point is with regard to the establishment of right of private defence, he must introduce the subject by submitting that his case is covered by the right of self-defence. Then he should bring out all the circumstances from the record and establish that point. The Counsel should be shrewd enough to see which point irritates the Judge when he introduces the same. In such a case if his point is very strong, he should deal with it at length, otherwise it is advisable to skip over the same. The facts of the case will determine to some extent what the disposition of the Judge ought to be in viewing it.

**Style (a) General:—** The style of the arguments should vary according to the disposition of the Judge. A Counsel should endeavour to study the face of the Judge and his mood. It would be rashness to approach a courteous pleasing looking Judge in a hectoring style. Nor would pure weakness always succeed with a Judge of a robust temperament. Judges and Magistrates are after all human beings. They have their passions and prejudices. Full allowance should be given to their weaknesses and limitations. I have come across a few Judges who were very short tempered and who would fly into fury at a trifling thing. With such Judges the golden rule is to keep cool and you command him well. The Judges should realise that to be angry about trifles is mean and childish; to rage and be furious is brutish; and to maintain perpetual wrath is a kin to the practice and temperament of devils; but to prevent and suppress rising resentments is wise and glorious; is manly and divine. A Judge generally gets angry in two ways. *First*, when a Counsel puts up a very foolish argument or presents a point which is against law and all accepted canons of jurisprudence. There is some justification for loss of temper by the Judge. *Secondly*, there are Judges who are over-presumptuous. They are obsessed with the idea that they are the embodiment of law and whatever they utter has the force of law. To these men of unlettered science I will only say that instead of bursting into fury and thus batter their ignorance of the accepted principles of law, they should devote more time in the study of law itself. Imagine a judge expounding a proposition of law which is utterly against the provisions of the Statute or against the decisions given by eminent Judges in a full Bench. The Counsel in the Court room reali-

ses that the judge is making a fool of himself. A judge has got another weakness; he sticks to the point although it is legally untenable. The Counsel in dealing with such a judge, should adopt a very calm and dignified attitude and after the storm has blown over, he should bring the judge to his own view point, by making references to the Statute as well as the judge made law. Let the judges realise that the chief aim is the attainment of justice. It is axiomatic that where anger reigns equilibrium and equipoise cannot remain. Anger begins in fury and ends in repentance. Hence it is expedient in the interest of justice that the atmosphere of the Court-room should be absolutely calm and quiet and unperturbed. It should be like a laboratory or a lecture-room. It is only in such an atmosphere that Counsels can put their view point and get justice for the client. A soft answer may at times turn away wrath but if it is a sign of want of courage it may but increase the ire. The main object of a lawyer is to obtain a good hearing and complete attention of the Court. If a Judge is having little affinities, or prides himself on his knowledge upon any particular subject, the exercise of little skill and patience may lead to success. If the judge begins to indulge in pleasantries or jokes, never forget your position in attempting to be familiar. The counsel should adopt himself to his moods, be gay with moderation when he is gay, be humble when he is stern, or severe and be earnest when he is interested. Quintilian has given a sound advice when he says that if the Judge be angry with your opponent, you should heap a coal of fire upon your adversaries' head, by mildly and meekly making a show of intercession on his being in such a way as to lay bare his delinquencies the more and thus open out a storming floor of indignation upon him.

(b) *Self-respect*:—In making your address to the Court you should always maintain an upright and dignified behaviour. It is annoying to know that some lawyers adopt a sort of cringing attitude. This fawning tone is the outcome of two things: first that the lawyer has not fully mastered the facts and the law on the subject. I know of a case where a Counsel repeatedly craved for indulgence and mercy on a point which was supported by a number of authorities. He wanted to make up his non-preparation of the case by throwing himself at the mercy of the Court and by flattering it. A counsel should always bear in mind that he owes a duty to his client as well as to his profession. He must remember that self reverence, self knowledge, self control, these three alone lead life to sovereign power. In short self respect is the corner stone of all virtues. Secondly: That the lawyer has a weak case and has not the courage to say so.

(c) *Courage*:—Courage is a quality that calls for admiration from everyone and a firm fore-front will often attach the Court to your side; but this virtue should be exhibited in a very small measure. Courage in danger is half the battle. A lawyer can show courage only when he has mastered all his case both on facts as well as law. Moral courage is virtue of a high cast and of nobler origin than physical. It springs from an ocean of virtue and renders a man in the pursuit or defence or right superior to a sphere of reproach or contempt. Courage in a law Court must be guided by skill. See Morison on Advocacy and Examination of witnesses Ch VI, Blair's Lectures on Rhetoric, Comphell's Philosophy of Rhetoric, Raithlug's Letters on the study and Practice of Law, and Osborn's Problem of Proof, pp. 66—84.

**Persuasion**—A judge is after all human and he has got this personal prejudices and passions. If you analyse the judicial skull, you will find that it is composed of ordinary human clay. The errors to which a human mind often falls prey will also be found even in an experienced judge. Man has a most extraordinary capacity for believing what he wants to believe. The fact is that any argument as presented to others or to us is at once either weakened or enforced by memories, experience, emotions, or prejudices that often or entirely beyond control. The will at once modifies belief by the interpretation and emphasis it puts upon testimony of any kind on any subject. What in others may seem to us, or in us may seem to others, to be mere unreasoning prejudice is a mixture of information, sentiment, tradition and emotion, which in combination powerfully affects judgment. We must all frankly confess that many of our opinions are what they are simply because we were born at a certain place at a certain time. By a course of training the intellect can in considerably degree be brought under the control of the will. This is the kind of training in intensive advocacy that tends to develop marked credulity in certain member of the legal profession. Because their desire to believe develops their ability to believe, their minds unconsciously become warped. Many of these men become at least partially disqualified to recognise inherent improbability in any statement of alleged facts or occurrences. Arguments by men with this weakness usually consist only of unsupported assertions and their powers of persuasion are of a very low order. Effective persuasion anticipates these various possible existing adverse ideas and illegal objections, and not only presents the facts upon which belief is to be based but to some extent also answers the unconscious objections arrayed against the contention that are already in the mind of the hearer. The skilful advocate remembers that man is only partially rational.

The citadel of the mind may be captured in more ways than one, but an entrance is not often gained without a proper approach. The first sentence of an argument is often the most important sentence because it is the first. By it, interest is kindled, suspicion removed and confidence awakened; or, on the other hand, antagonism is aroused and a prejudice created that it is difficult to overcome. The mind opens or shuts according to the hailing signs given, and the truth itself may be told in such a way that it is not believed.

A familiar acquaintance with Plato, and that famous old teacher of his, has helped many who would learn to persuade and to reason about things; and full of wise suggestions is Franklin's quaint recital in his autobiography of how he improved himself in the art of leading others to his way of thinking. These men teach that often the most effective part of an argument is a skilful inquiry, a Socratic question, that penetrates to the heart of a subject and puts in operation the receiving mind that is being worked upon; then a definite statement with just the proper emphasis gains admission almost unawares and an idea is planted in the mind of another.

The skilful pleader does not often find it advisable to attempt to force an idea full grown and complete into the mind of another. He plants it by skilful suggestion and then nurtures it with rich words until it develops into a mature thought in the mind of the hearer. Antony's funeral oration is a masterpiece of suggestion and persuasion. The other extreme of undue caution is sometimes fatal to succeed and the mental fort is not captured because a too long and circuitous line of attack was followed. The speaker who is to carry conviction must also correctly adjust the emphasis of his

language to the topic he is discussing and to the capacity of his hearers. Belief and unbelief are no doubt greatly affected by control and by excess of emphasis. One of the common indications of insincerity in the salesman and the legal pleader is undue and improperly placed emphasis. The successful speaker is earnest when earnestness is proper but we at once recognise the weakness in one who "doth protest too much." If, however, the conditions warrant emphasis and strong statement, then the absence of these qualities is unnatural and suspicious. When a man's character is impugned and he answers as he would if asked the time of day, we are inclined to infer that there is some basis for suspicion as to his past.

Another obstacle to success in persuasion and one of the conspicuous faults of advocacy is the leaving in the mind of the hearer the suspicion that the evidence is not all in that there is in fact something vital yet to be said on the other side of the question. In order to be conclusive an argument must take some account of the position. As long as the hearer suspects that there is information and not supplied he is in a state of doubt and thus is partly prepared to be convinced that the contention of the opposition is correct.

Some considerations of the claims of the opposition also is necessary in order that an argument, especially the argument of the advocate, should not lack the important elements of frankness and fairness. Lacking these two qualities an otherwise quite perfect argument will often fail to persuade. If it appears that one does not dare to consider an opponent's point of view, the necessary inference is that he has some doubt about the strength of his own contention. The quality and force of an argument on any question can be measured quite accurately by the character of the consideration given to opposing evidence. The tendency of narrow minded advocacy is to ignore, belittle or deny the value of all opposing testimony. This is not usually good generalship on any field, unless the antagonist actually deserves such treatment and this can be made apparent. Opposition is not often made contemptuous by merely calling it so.

Even though it may be erroneous, or even corrupt, opposing testimony, or argument, that has made an impression must be met in some way, and, as a rule, it must be discounted by something more than the mere statement of a partisan advocate no matter how loud, or long, or violent the statement is. One of the common fallacies of advocacy is the notion that strong testimony can be destroyed by weak argument. This exaggeration of the force of an advocate's mere statements often is one of the contributing causes of defeat. He cannot persuade a jury that they have not heard certain testimony.

It is ridiculous to attempt to bring a hearer to the point of persuasion by compulsion and it is not an intelligent act by one who seeks to lead another to his own point of view to attempt to ram arguments down the throat of his unwilling victim. The attorney who is sure of his own ground often finds it advisable not to approach opposing testimony by assuming that all adverse witnesses are either scoundrels who have committed perjury, or feeble-minded babblers. Plain words should be spoken when they are justified but one who uses "blunderbus" abuse is quite sure to get somewhat spattered himself. The most persuasive argument on any subject, in which the one making the argument has a clear and sound basis for own contention includes a proper consideration of the claims of the opposing party followed by a strong argument for his own contention. If a lawyer has no case, and is against both the law and the facts, he naturally is inclined to admit nothing.



## GENERAL RULES REGARDING ARGUMENTS

and claim everything but fortunately he is not thus likely to deceive many. One who establishes his arguments by influence and command, shows that this reason is weak. Courage does not consist in heat and animosity or contest and conflict; they never strengthen the understanding, clear the perspicacity and guide the judgment. The rule is to be calm in arguing; for fierceness makes an error a fault and truth discourtesy. Calmness is a great advantage. The nature, character and inclination of the judge should perpetually be borne in mind. If one desires to convert the other to one's own view, it would be useless if one really had the conviction of right on one's own side. If one believes that his case is just he will fervently argue for the side and carry conviction to the mind of the judge. It comes almost natural to lawyers of experience to identify themselves with their client's case. It has often happened that the judge is whimsical and he has taken a wrong stand. The duty of the counsel in these circumstances is rather difficult. If he tells the judge in a blunt manner that he is wrong, the client is sure to suffer; because there are few noble judges who when told that the exposition of law which they have openly declared from the Bench is against all the accepted principles of law, would acknowledge their mistake and correct themselves. It is common experience that unlettered judges often get annoyed and irritated when some eminent counsel begins to expound the view point which they have expressed in a case. My advice to the counsel is that they should always presume that the judge is not aware of the latest authorities bearing on the point and should adjust his arguments in such a way that he gives the resume of the whole law on the subject in quite an interesting manner. It was Anacharsis who said "wise men argue causes, fools decide them". Courage always come with experience. The three great essentials to achieve anything worthwhile are: first hard work; second stick-to-it-iveness; third commonsense. A counsel should never allow himself to be discouraged in any circumstances. If in the beginning of your career you feel discouraged or face difficulties and disappointments, never despair; for much good work is lost for the lack of a little more. Sometimes the idea as to what will be the result of the case discourages us. A lawyer should act like a medical man when doing the work in an operation theatre. He uses the knife with all the dexterity and skill at this command but leaves the result to the Almighty the Supreme Physician. When once a decision is reached, an execution is the order of the day; dismiss absolutely all responsibility and care about the outcome. Why not try a Roosevelt's plan. Why not, if you are discouraged and feeling like giving up the fight, to make a speaker of yourself; why not pull out of your pocket one of the five dollar bill that bears a likeness of Lincoln and ask yourself "what he would do under these circumstances". After he had been beaten by Douglas in the race for the U. S. A. Senate, he admonished his followers, not to give up after one nor hundred defeats. Hence it is easily in your power to attain success as an advocate. It is easily in your power to do this. Only believe that you will succeed. Believe it firmly and you will then do what is necessary to bring success. Albert Hubbert is right in saying that "thought is supreme. Preserve a right mental attitude of courage, frankness and good cheer. All things go through and every sincere desire is answered. We become like that on which our hearts are fixed. Carry your chain in and the crown of your head high, and place your implicit and abiding faith in Him.

**Oratory.**—The chief weapons in the orator's harmony were rhetoric and elocution.

The oration was divided into five parts. 1. *The exordium*, in which he sought to conciliate the Favor of the Judges, to inspire them with bene-



volent dispositions towards his client and with dishonor to the adversary, and to give them a general understanding of the characteristics of the cause. 2. *The narration*, including a concise and lucid statement of the facts and issues, touching lightly those which are hostile to the client and bringing out, in bold relief, those which are favorable. 3. *The confirmation*, in which the arguments for the right of the client are solidly and powerfully enforced. 4. *The rebuttal* in which those of the adversary are fiercely assaulted and demolished. 5. *The peroration*, in which, with a fine effort, the orator appeals to the passions, the prejudices, and the sympathies of the Judges, and bring to bear the whole force of the eloquence to establish the cause of his client and to destroy that of his adversary. The whole proceeding was theatrical in the extreme. The speaker employed all the arts of the actor. He strode up and down the rostrum he varied the inflections of his voice to suit every emotion, his countenance, was drilled to express every sentiment, he frowned, he wept, he taught his lips to tremble his eyes to glare, he stamped his feet, he shook his thighs, his chest, extended his arms in supplication to the Judges or raised them on high in his appeals to the gods; his whole body attuned its movements to match the motive of the discourse. But now we have greatly eliminated, the theatrical aspect.

**Arrangement.** You must address your ideas in a perfect logical manner. Arrange your thoughts and ideas from the huge mass of evidence that has been led in the case. It is no use to put up the case in a dry, discourteous and undigested manner. Such a thing happens when a counsel has not thought over his subject adequately. If the whole case has not been prearranged, the whole affair would be flat, flavourless and unprofitable. Some Counsel trusts upon the inspiration of the moment. But that is a fatal rock upon which many promising careers have been wrecked. The sure road to inspiration is preparation. Many a man of courage and capacity have failed for lack of industry. Mastery in speech can only be reached by mastery in ones subject. Alexander Hamilton when asked as to how he attained success in public speaking, said "Men give me some credit of genius. All the genius I think lies in this: When I have a subject in hand, I study it perfectly and day and night it is before me. I explore it in all its bearings. My mind becomes pre-occupied with it. With efforts I win what people are pleased to call the fruits of genius. In fact it is the fruits of labour and thought." When a man's knowledge is not in order, the greater will be his confusion of thought. A speech is a voyage with a purpose and it must be chartered. The man who starts nowhere generally gets there.

As in building a house: it is not sufficient to gather a heap of stones and all the other necessary implements and material unless the architect's skill is employed in arranging them in their proper places, so in matters of eloquence, however numerous the subjects, they will but make a confused heap unless disposed of in a regular and uniform whole, by adjusting and digesting them in order. All symmetry would be lost in a statue unless the limbs were equally proportioned; and with animals and human beings if a portion of the body be misshapen or altogether wanting, it is deemed a monster. Dislocated limbs lose their power and armies in confusion are an impediment to any manoeuvre; so, a speech wanting in arrangement must run into extreme confusion, wandering about like a ship without a steersman, incoherent with itself, losing its way as by night in unknown paths and without proposing to itself any proper beginning or end, but following rather the guidance of chance than of reason. The gifts of so selecting and

arranging facts and arguments that the exposition of the case shall be well proportioned and logical and its pattern harmonious cannot be over-estimated. Orderliness is itself persuasive. What the mind easily follows the mind is predisposed to favour. The distraction caused by the untidy presentation of a case involves loss of time and temper on the part of all concerned, and may even lead to the loss of the case itself. You will recall the well-known admonition of Mr. Justice Maule to a blundering counsel: "It may be my fault that I cannot follow you; I know that my brain in getting old and dilapidated; but I should like to stipulate for some sort of order. There are plenty of them. There is the chronological, the botanical, the metaphysical, the geographical—even the alphabetical order would be better—then no order at all."

**Funds of Stories.**—A fund of stories to frequently enable a counsel to amuse a Court and get it into great humour or to counter-act an effect produced by the adversary upon either the Court or the jury. It is also a method by which you divert the attention of the Court from a damaging point against you. A story should be apropos, well told, concise and new. Whenever it deviates from these rules, the wise will slip and leave applause to fools. Story telling is subject to unavoidable difficulties—frequent repetition and being soon exhausted; so that whoever values this gift in himself, has the need of a good memory.

**Similes.**—In order to bring a matter into great clearness a wise counsel will always give some example similar to the facts in question; but in reality falling a little short of it. Thus he will be able to persuade the Court by such examples and convince it more easily as to the facts. Counsel can score his point by drawing similes only when he has the advantage of a wide and extensive reading, erudition, with retentiveness of memory.

## CHAPTER 107

### Manner of Addressing Court

The success of a case mainly depends upon the manner in which the case is put before the Court. In a hopeless case it will be sheer waste of time and energy to dilate on facts. "The argument must be adapted to the case and framed with the single purpose of securing the verdict of the jury in that particular case. Whatever will conduce to this end should be done, and whatever will not aid in attaining it should be sternly put aside. The one great purpose should determine the frame of the argument, no matter how strong the temptation to wander into collateral matters affording opportunity for the display of rhetorical and declamatory powers. We do not speak of eloquence, because we believe that there is no such thing as genuine eloquence where the speaker's words do not tend to convince or persuade in the particular case in which he speaks; for no matter how beautiful his imagery or well rounded his periods, his eloquence is spurious, resembling the genuine only as the counterfeiter's most skilful work resembles the treasury note that bears the government's warrant of value. To be eloquent, the diction and structure of the speech must be suited to the occasion" (Work of the Advocate p. 350, from Cicero).

"There is a power in words. Words without ideas are so far as conviction and persuasion are concerned, barren things. They are husks without kernels. But, paradoxical as it may seem, common place ideas, and, indeed, even feeble ones, derive power from strong words. When both the thought and the language are strong there is real power; but a really strong

idea may sometimes be so incased in words as to be, so far as a hearer can perceive, deprived of its strength. On the other hand, feeble ideas may sometimes be so girt with words as to seem strong. Strength in oratory does in no small measure, reside in words. Many an idea is shorn of its strength by a divesture of its vigorous words as effectually as Samson was of his strength by the shearing of his hair. The words of power are special words, and the special words of greatest power are, generally, the short, simple and plain ones. A man thoroughly in earnest seldom uses grand words. Short words with a special meaning name things and give them as nearly a real character as it is possible for words to do. Names with a meaning are instruments of power. Power in diction as well as in thought, is what an advocate most needs." (Work of the Advocate pp. 362, 363, 364).

"It must be borne in mind by the advocate that digression which would be perhaps pardonable in a speech to a popular assembly or in address to the jury, would be entirely out of place in an address to the Court, and he must not think that the ancient judicial orations as models, because strict law was much less an object of attention at Greece and Rome than it is with us." "For these, and other reasons, according to an able writer, 'it is clear, that the eloquence of the bar is of a much more limited, more sober and chastened kind, than that of popular assemblies, and for similar reason, we must be beware of considering even the judicial orations of Cicero and Demosthenes, as exact models of the manner of speaking which is adapted to the present state of the bar.' It must not be inferred from what we have said, however, that eloquence at the bar is not useful, and that in speaking to the Court oratorical excellences are out of place. Eloquence which is sober and chastened is needed nowhere more than at the bar. Many of the causes discussed are devoid of interest, and the eloquent speaker can always command attention, and it is not usual for anything he says to pass unregarded. There is always a great difference in the impression made upon the audience, who sometimes listen to the argument of questions of law by a dry and confused speaker, and that made by one who pleads the same cause with elegance, ardor and strength. The spectators remark, and the parties to the cause watch, and the advocate who succeeds always in putting his causes well to the Court will, in the end, have the greatest multitude of clients." (Hardwicke pp. 392, 393, 394).

"The advocate while addressing the Court should by all means avoid a dogmatic manner. Even if he has the greatest ability and an inexhaustible fund of legal knowledge, he should carry himself with modesty and deference. Rufus Choate's bearing in Court was always modest. One of his biographers says of him :—"His demeanor and bearing in the Court-room was very interesting. It was a model of gentlemanly deference. He took his seat in the most modest, unassuming way. Indeed he never did anything which had the appearance, to use the vulgar phrase, of 'making a spread'. If, as sometimes happened, the opposite counsel was a young man, the manner of the youth would generally indicate that he was the greater man of the two. Even when the evidence was in, and Mr. Choate came into the Court, on the morning of the argument, pressing his way through the thronged bar and the crowded aisles, he came with no bold warranty of supremacy and success in his manner. Notwithstanding his quiet and gentlemanly demeanour, whenever the exigencies of the case demanded courageous conduct, no advocate was ever more courageous, and the same biographer says of him. "Whoever or whatever stood in the way of his success, whether high or low, rich or poor, must go down. It would go down with no unnecessary flourish of trumpets, no

bullying, no violence, no insult,—but it must go down” (Hardwicke, pp. 397, 398).

“The manner of Willam Pinckney in Court was arrogant and offensive and made him many enemies. He was dictatorial and often insulting in his manner. Daniel Webster was insulted by Pinckney on one occasion in the Supreme Court room during the argument of a case. Webster had too much respect for the Court to reply to his insulting language but when the Court adjourned he took Mr. Pinckney into a room in the Capitol, telling him he wished to speak to him on a matter of business. When they entered the room Webster locked the door, unperceived by Pinckney, and put the key into his pocket. He then stepped in front of Pinckney, and said to him in substance, “You insulted me in the Supreme Court to-day, and you must apologise to me now, and to the Court in the morning, if you do not do so one of us will leave the room in a worse condition than he was when he entered it.” Pinckney turned as pale as death, and looked steadily at Webster for a moment, then he said: “Webster, I did try to impose upon and to bully you, and I am willing to make the apologies you request me to make. Mr. Webster then unlocked the door, and they both left the room.” (Hardwicke, pp. 398, 399).

“Be uniformly respectful, but never servile, to the Court. Be firm, if you please—but approach not the confines of flippancy, familiarity or presumption. A rebuke under such circumstances will be justly calling and humiliating. The ear of the Court is gained by modesty, and by speaking briefly and to the point. It is closed against assurance, volubility, prolixity, repetition. How disgusting and intolerable is it to hear a man going doggedly over ground already gone over—as if the judges had not heard or understood your senior—as if there were no other case to be heard but your own—as if you were not the subject of the ‘curses, not loud but deep,’ of those whom you keep waiting to be heard in their own cases—possibly of far greater importance than that with which you are pestering the Court *ad nauseam*! Observe how differently the Court listens to a sinner of this sort, and to a man who has earned the character of being brief and lucid. Do not give up too easily; but avoid that accursed pertinacity which you may occasionally see exhibited. Look at the faces of the judges while suffering under the infliction. Be courteous to your opponents. When you find that you are being beaten, then is the moment to guard against the least manifestation of a ruffled temper—of irritability, or snappishness, or downright ill-humour. It will provoke only laughter or dislike. ‘Tis at this pinching point that you may infallibly distinguish between the temper and breeding of different men—between the man well-bred, and him underbred, or ill-bred. A gentleman is a gentleman to the end of the chapter. Never take offence at what is said or done by your opponent, or your leader, unless you deliberately believe that offence was intended. If that be the case, you must act as your own sense of self-respect may prompt—with spirit but prudence. Never permit yourself to speak in a disparaging tone of any of your brethren in the presence of clients. If you cannot praise, be silent. Do not expose a slip, or error; but, if possible, and consistent with your duty to your own client, conceal that slip or error, as you would wish your own to be concealed.

“Avoid buffoonery in conducting a cause. Use no vulgar language, jokes, gestures or grimace. Play to the critics in the pit, not to the gods in the gallery. You may possibly make a foolish juryman and bystander laugh with you, when every one else is laughing at you, or is indignant at the degrading exhibition which you are making, possibly before some foreigner, or stranger

of critical acuteness and refinement, and who may speak of what he has seen, as a sample of the English bar."

"*Pay attention to manner.* Take a few lessons in elocution, if conscious of deficiency. Stand straight up while addressing either judge or jury, or examining a witness, and do not be sprawling over the desk and benches. Speak with distinctness, emphasis and due deliberation, if you wish to be heard and attended to. Do everything in your power to acquire self-possession, practice at debating societies, or elsewhere as you may have opportunity. A flustered speaker is always a bad one—giving pain to his auditors, and securing to himself harassing consciousness, on sitting down, that he has not done justice to either his clients or himself. When you are unexpectedly let alone in a case, keep quiet—be tranquil. Do not proclaim your inexperience or incompetence, by fidgetting yourself and others. To adopt a Scottish phrase, 'Dinna fack yourself.' When a hint is given you by an experienced neighbour, give your mind to it, and receive it with courteous gratitude."

"*Never under value your opponent*, but give him credit for being able to take advantage of the weak parts in your own case, and be on your guard accordingly."

"Do not be disheartened when facts come out adverse to your case, either unexpectedly from your own witnesses, or from those of your opponent. Every fact has two aspects, one favourable to him who adduces it, and another favourable to you, if you have sharpness enough to see it. The moment that it is established in evidence, try to reconcile it with your own facts. Endeavour to secure a command over your features. When the most desperate mischance is befalling you—when the iron is entering your soul—look calm and maintain an air of cheerful confidence. In this the late Lord Abinger and Sir William Follett were perfectly successful. The jury are watching you, and are often much influenced by such matters. Never attempt to deceive the judge. When he asks you a critical question, answer cautiously, but not disingenuously. Scorn equivocation, equally the *suppressio veri* and *suggestio falsi*. Candor and frankness are precious qualities in judicial estimation. Consider how silly and useless is the attempt to play off the petty tricks of practice with men of their thorough experience and knowledge of the profession—its members—and its ways. You may perhaps have too much assurance or stolidity to perceive it, but every one else may see significant and dangerous indications of their profound contempt towards you."

Hon'ble Mr. Justice Sunda Aiyar, Judge of the Madras High Court, gives the following good advice about arguments in Court. He says: "In addressing arguments to a Court—what is the duty of the advocate? There, I think, the difficulty is much less than in leading evidence. There can be no doubt that nothing which is on record should be suppressed, and everything material should be honestly put before the Court, but here again a good deal must be left still to each individual's conscience. It can hardly be pretended that everything that has been introduced into the record, including sometimes a great deal of irrelevant matter and much of a trivial nature should be put before the Court; but it would be not merely right, but also good policy, to put before the Court every thing that could be material from the point of view of the opponent. The opponent is likely to make capital out of any omission and suggest that the omission was intentional, because in the opinion of the advocate himself it would have a damaging effect on the case of his client. What then is the scope of the advocate's art in the submission of the

facts? His first duty is to completely master the facts and the law, and present them in as attractive a garb as possible. He should use all possible efforts to arrest the attention of the Court and to state the facts in an interesting way and avoid all dull and prosy talk. If he does that, you may be certain he is not likely to get the judge's attention, who will prefer to look into the papers himself. It is not wise to read much out of documents; it would be very desirable that the reading should be confined to the most material portions; it will be much better that with regard to the remainder you should state in your own language; otherwise you will not be able to hold the attention of the Court. "Perhaps you may imagine, if an advocate is bound to put everything before the Court—all the facts—then, how is he at all to succeed in producing an impression in favour of his client? You may ask: "If both sides are to put all the facts, why require two counsel?" But in reality, thus is a great deal of scope for the advocate's art, notwithstanding his duty to state all material facts. Let me give one illustration. Suppose you have a picture. The appearance it presents will differ according to the places from which you look at it and according to the light in which you see it. I may say the advocate's skill, if he has any, will consist in putting the judge at a particular place, in distributing the light and shade in the manner that will suit best his client. It may look monstrous, viewed from one angle; may look handsome and even beautiful looked at from another. When both sides have exercised their skill in the presentation of the picture, it will be judge's duty to see the picture from all points, to shift his own position, to go round and to see and examine every part. It would not be illegitimate on the part of an advocate to adjust the proportion of particular facts to the exigencies of his client's case by placing some facts first, and others last. A good advocate can impress the judge sometimes in a way that he cannot get beyond him; he can be induced to place everything coming from the opposite side in the setting already imposed on him, and the result is that facts which might really be important appear to him to be comparatively trivial, when they are afterwards stated by the opposite side. If you see two skilful advocates arrayed as opponents, you would then be able to witness a picture presented by one advocate; then, when the turn of his opponent comes, the whole thing being reversed the same facts being stated by him—in a different order, placed in a different setting. Every good judge will feel it his duty not to refuse to examine any case from the advocate's point of view; and no judge need be afraid to do so, because, after he has acceded to the request and looked at it from a particular point of view, he, of course, looks from other points of view, and nothing is more conducive to a thorough grasp as to look at the same thing from different points of view." "An advocate is doomed to failure who can only repeat the same thing in the same language: that is indeed the best way to obtain the reputation of a bore. At the same time there is one mistake committed by beginners,—sometimes also by people who are not beginners—namely, that they do not dwell sufficiently on an important fact, or on an important aspect of the case. That aspect being familiar to the speaker, he thinks that it has only to be mentioned in order to obtain recognition; but the fact often is that the judge's mind is possessed by some particular aspect of the case. It is, therefore, important that, when it is necessary, the advocate should dwell on a particular matter but the right way to dwell on is not to repeat in the same form, as I have already observed." (Professional Ethics, pp. 65—69).

"It is generally the best policy not to disregard the opponent's facts, on record, and it is one of the best efforts of advocacy to get the judge to

minimise their weight and importance. So far as an original trial is concerned it may safely be affirmed that one is not bound to bring into the record all the facts that have a bearing on the case. But there are some duties which are often neglected but which ought to be honestly and thoroughly performed. In a client is called upon to produce documents in his possession, they ought to be produced, and every advocate ought to advise his client that, whatever may be the result, he has no right to suppress documents in his possession if called for by the other side. I am afraid that there is sometimes much laxity in the observance of this rule. Some pleaders are apt to say to themselves: "Why should I help by producing my document? Let him give secondary evidence"—that is absolutely wrong. You know of course that every person is bound to produce all documents in his possession except that strangers to the litigation are not bound to produce their title-deeds." (Professional Ethics, pp. 63, 64).

## CHAPTER 108

### Arguments in Criminal Trials.

*Trials held by Magistrates*:—Criminal Procedure Codes does not provide for Arguments by Counsel in Criminal trials held by magistrates, yet an opportunity for arguments must be allowed to the Accused. If such an opportunity is not offered to the Accused, conviction will be set aside. 1925 All. 282 : 87 I. C. 796. It is the duty of the Court to hear arguments that may be offered in every criminal trial or proceedings. 1944 Lah. 10, 1925 Oudh 228 : 25 Cr. L. J. 1380. It is not a question of indulgence but of right, as it is an elementary principle of law that no order ought to be made to a man's prejudice without hearing him. 1 Cr. L. J. 760 : 6 Bom. L. R. 665. It was pointed out by Derbyshire C. J. in a N. D. Mojumdar Vs. A. E. Porter, 1945 Cal. 107 (114) that there is a very old principle of law which is expressed by the Latin maxim *audi alteram partem* which means 'hear the other side.' So long ago as 1724 the Court of King's Bench had occasion to deal with that maxim. That was in the case in (1724) 1 Strange's Reports 557, where the University of Cambridge deprived Dr. Richard Bentley, a famous scholar of his academical degrees without giving him first an opportunity of being heard. The Court of King's Bench laid down the principle that he could not be deprived of those rights without the opportunity of being heard in his defence and they did so in language which was emphatic but quaint. That case was followed in 1863 in (1863) 14 C. B. (N. S. 180). There the Wandsworth Local Board under the powers which it had under the Metropolis Local Management Act of 1865 pulled down a house belonging to Mr. Cooper on the ground that it was built in contravention of the law, but before doing so gave him no opportunity of showing cause why the house should not be pulled down. The Court held that Cooper ought to have been given an opportunity to show cause before the house was pulled down and followed and approved of what was said in the case of Dr. Bentley and even re-cited some of the quaint language.

Section 340 Cr. P. C. provides that any person accused of an offence before a Criminal Court or against whom the proceedings are instituted under this Code in any such Court may of right be defended by a pleader. This section clearly signifies that accused should be adequately represented and the accused's case should be put before the Court in all its stages including that of addressing arguments. Blacker J. in A. I. R. 1944 L. 10 observed: "It is not



correct to say that the hearing of arguments is not a part of the hearing of the case before a Magistrate as arguments are not provided for in the trial of cases by Magistrates but are only specifically provided for by the Code in the provisions relating to the trial of sessions cases or cases in the High Court. The procedure for sessions trials has only laid down the specific order in which the prosecutor and the accused or his defender shall address the Court. This cannot be taken as meaning that the accused is to be deprived in a magisterial trial of his inherent right of putting his side of the case before the Magistrate before it is finally decided. The accused has a right to address the Court even in a case tried by a Magistrate. It has been held in a number of cases that the refusal on the part of the Magistrate to hear accused's Counsel vitiates the trial. 1928 M. 1234. It is necessary that the parties should be heard in each others presence. If such a course is not followed the proceedings are liable to be quashed. 1932 Cal. 856 : 33 Cr. L. J. 775. When there are more than one accused, their Counsel should all be heard after the conclusion of the whole of the evidence otherwise the procedure is illegal. In such a case the trial will not be vitiated in the absence of proof of prejudice to the accused. 1932 Lah. 103 : 33 Cr. L. J. 97. If the prosecution was not given opportunity to argue the case under S. 110 Cr. P. C., there is no illegality, 1944 Oudh 96. When the Court is in camp it can give judgment without hearing the pleaders who did not attend because in such a case an opportunity was given that was not availed of. 1923 N. 208 : 23 Cr. L. J. 752.

In an application under S. 483 Cr. P. C. the parties were examined and the case was closed for orders. The pleader for the husband appeared and wished to argue the case and file some documents. The Court ruled out the pleader and passed judgment. It was held that case should be retried. 1930 N. 59 : 31 Cr. L. J. 110. Where the Court witness was examined after the close of both parties' case and arguments and the magistrate was not required to hear further arguments, it was held that no objection could be entertained in revision. 1924 Cal. 980 : 25 Cr. L. J. 1107.

**Curtailling Arguments :—**A magistrate may cut short argument which has proceeded for an inordinate length of time. 35 Cal. 243. The fact that accused's counsel was unnecessarily curtailed is good ground for ordering re-trial. 1937 Pat. 263 : 15 P. 817. Where the Court fixed a time limit for the arguments and refused to enlarge time and the defence refused to argue conviction was held to be illegal. The fact that arguments were fully advanced in the lower Appellate Court will not rectify the defect. 45 C. W. N 1045. It is the fundamental right of every citizen to be heard effectively in his defence before he is pronounced guilty. This right has been vouchsafed to the American people by this constitution. An eminent American writer remarks that "To restrict counsel to such times as suits the caprice or even the opinion of the Judge, in my judgment, I speak with deference, is to touch the constitution, and to touch is to profane."

*In law fling its protecting shield before the accused and presumes his innocence.* The aim of the law is to satisfy even the prisoner that his trial is fair. He, above all, is to be consulted. The convenience of the jury is nothing—they are called by chance to discharge a sacred duty which the state exacts. The rights of the accused are everything. Justice is "not to be measured by an hour glass." It is the one supreme occasion in the life of the indicated citizen. His person, reputation dearer than life, his future, all hang trembling on the issue. He builds his last hope upon his advocate. To him he trusts to calm the storm of prejudice, to him he turns to sift the evidence that looks like a guilt, to tear as under



the web that fate has thrown around him, expose the fallacies, lay bare the perjury and marshal in triumphant procession the facts that vindicate his innocence. To tell the advocate,—his brain and heart, his very soul, thrilling with the terrible responsibility,—that he must stop when the clock strikes a certain hour, is to stab justice through the heart when seated in her temple. It may be said the Judge will give further time if he thinks it needed. Favors are not to be thought of when rights are in jeopardy. The advocate must not start handicapped, his mind must be unfettered by a fear. If told that at a given moment he must close, he skims important points, omits others entirely, he is harassed with the thought that every moment his time is fleeing, and he resumes his seat conscious that he has fallen short of his full duty." 26 *American Law Journal* 185—186.

*Written Arguments.*—Where a counsel is entitled to be heard, he is entitled generally to be heard by an oral address and not by written speech. 1921 Cal. 436. It is the duty of the presiding officer to take such notes of the arguments as he thinks fit when they are being submitted to the Court. 1921 Cal. 426. The practice of allowing Counsel to file memoranda of arguments has been held by various High Courts to be improper especially when they are taken behind the back of one of the parties. 1928. Bom. 557: 53 Bom. 119: 28 Mad. 1130, 1926. Sindh 194. Written address filed by counsel do not stand higher than Judges' notes of counsel's arguments. 53 B. 119 1928 B. 557: 50 Bom. L. R. 1530. 1921 C. 426. It is open to Court not to accept notes of arguments filed by pleader of the accused; but if he accepts it, it must form part of the record and should not be destroyed till expiration of period of appeal. 1926 S. 194: 94 I. C. 903: 27 Cr. L. J. 711. Counsel can waive his right of oral address in favour of written one. 53 B. 119. The practice of receiving written arguments from parties after a case has been heard is most reprehensible. 37 Cr. L. J. 1089: 165 I. C. 153, especially when they are taken behind the back of the parties. 1928 B. 557. 1926 S. 194. Where written arguments were received from parties a week after the arguments were heard and subsequently additional written arguments were received from the prosecution with and opportunity being given to defence to reply, the conviction should be set aside.

*By private prosecutor or complaint*—A private prosecutor has no right to be heard. 35 C. W. N. 976: 1932 C. 61. A complaint cannot claim as of right to be heard in appeal. It is purely in the discretion of the Court. 29 P. R. 1886, 7 M. H. C. R. 42 (App.) 1937 N. 394. There is no provision for appearance or arguments by the complainant's advocate. He can only assist the public prosecutor and be prepared to assist the Court when called upon. 43 Cr. L. J. 345 1940 B. 14. 41 Cr. L. J. 245 *Appr.*, 1925 S. 99: 25 Cr. L. J. 574 *Dist.*, 1933 S. 345: 35 Cr. L. J. 320 *Expl.* In private prosecutions Court may allow the complainant to appear by an advocate, but it is not bound to do so. 1940 B. 14: 41 Cr. L. J. 245.

*In sessions trial.*—When a sessions trial is concluded, the prosecutor has to begin his arguments if the accused, has not led evidence in defence. In such a case the accused Counsel has a right of reply. But if the accused adduces any oral evidence, his counsel shall begin to address and the prosecutor shall have a right of reply. This is provided for in S. 292 Cr. P. Code. Where the accused has not called any evidence on his behalf, he has the right to be heard last. 53 B. 119: 1928 B. 557. The putting in of deposition of witnesses made before the Committing Magistrate and the police is not adducing evidence. 31 C. 1050, 11 Bom. L. R. 177, 14 C. 245, 17 C. 930, 10 C. 1024, 14 B. 436. Even if one of the accused calls

witnesses and the others do not, the prosecution is entitled to reply not merely on the evidence adduced by one of the accused, but generally on the whole case 18 B. 364. The prosecution shall be entitled to reply if the documentary evidence for the defence is adduced after the case for the prosecution is closed. 43 C. 426. If right of reply is not given, proceeding will be set aside. 1932 C. 856. Erroneous decision as to the right of reply cannot be treated as such an illegality vitiating the proceeding. 1931 L. 534: 13 L. 172. Where in a Sessions Court an accused is unrepresented, the Judge should bring to the notice of the jury the argument which would have been advanced, if he had been represented by pleader, else it will be urged that there was non-direction in the charge of the jury. 1930 S. 303: 32 Cr. L. J. 172.

## CHAPTER 109

### In Criminal Appeals and Revisions

**In appeals.**—S. 421 Cr. P. Code provides that no appeal presented under S. 419 Cr. P. C. shall be dismissed unless the Appellant or his Pleader has had a reasonable opportunity of being heard in support of the same. The proviso contained in S. 421 applies only to appeals presented by Counsel and not to appeals presented under S. 420 of Cr. P. C. from Jail. Hence, in cases of Jail appeals the Court can summarily dismiss the appeal on a perusal of the papers without calling upon the appellant to appear. 1938 B. 279, 39 Cr. L. J. 578, 13 All. 171; 40 Mad. 382, 1927 Sindh 227. As a matter of indulgence the Court may allow the prisoner to appear in person and argue the appeal 1934 Bom. 279. The opportunity given to the accused should be a reasonable one. Asking the pleader to argue the appeal straight away when it is presented, is improper. 53 M. 865, 117 I. C. 279: 1929 N. 150: 30 Cr. L. J. 791. Appellate Court must give a reasonable opportunity to the Appellant's Counsel to be heard. 1929 N. 150, 1926 C. 161, 101 I. C. 595, 1941 M. 802. Even if the appeal is filed beyond time, Appellant's Counsel must be heard. 1927 B. 445: 103 I. C. 109: 28 Cr. L. J. 653. A private prosecutor has no right to be heard. 1932 C. 61, 33 Cr. L. J. 305. Appeal may not be postponed if opportunity was given to Appellant's Counsel. 53 M. 865: 1930 M. 863: 127 I. C. 803: 32 Cr. L. J. 40. S. 421 does not require that appellant or his Pleader must be heard before appeal is decided but a sufficient opportunity should be afforded to them to be heard. 1935 S. 84: 36 Cr. L. J. 831; 1939 C. 541, 40 Cr. L. J. 839. If an appeal is dismissed without giving opportunity to appellant or his pleader for being heard, the order is Without jurisdiction and the appeal should be reheard. 1925 L. 355: 26 Cr. L. J. 1169. If Appellant's Counsel was absent, and Sessions Judge examined the evidence there was hearing of appeal within S. 423. 1935 P. 515: 36 Cr. L. J. 1354. Parties must be heard in each other's presence. Appellant has right of reply. 1932 C. 856: 36 C. W. N. 699: 33 Cr. L. J. 775. A jail prisoner has no right to be heard. 1938 B. 279. If in appeal by Crown, the Crown counsel is absent, Court can allow complainant's counsel as such or *amicus curiæ* to argue. 1942 L. 296. If an appeal is disposed of in the absence of counsel assigned by the Government to the accused, who was unable to attend, the order is illegal. 1944 P. C. 93: 46 Cr. L. J. 103. A right of being heard in support will include the right of reply as well as the right to refer to certified copies of the evidence. 9 Cr. L. J. 53.

**In revision.**—Section 440 Criminal Procedure Code provides that no party has any right to be heard either personally or by pleader before

any Court when exercising its powers of revision : provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader and that nothing in this section shall be deemed to affect section 439, sub-section (2). All judicial decisions are, as a matter of general principle, governed by maxim *audi alteram partem* (no one should be condemned unheard) In other words, it is an indispensable requirement of justice that the person who has to decide a dispute shall hear both parties, giving each an opportunity of hearing what is urged against him. But section 440 Cr. P. Code is, to a certain extent an exception to the general rule mentioned above, in that it provides that in revision no party has a right to be heard. At the same time it recognises the general rule in that it saves the provisions of S. 439 sub-section (2) which provides that no order in revision can be made under that section to the prejudice of an accused person unless he has had an opportunity of being heard. Thus in Criminal Revision, a Counsel has, by long Practice, acquired a right to be heard.

In conclusion it will not be out of place to give few practical hints as to the presentation of a cause in an appellate court. "The first and most important qualification for a successful advocate before an appellate tribunal is the ability to concisely, accurately, clearly and forcibly state the facts of the case, so far as they are material, to enable the Court to pass upon the questions of law. Counsel who can accomplish this without unnecessary repetition, and without reading to the Court tedious extracts from the record, has accomplished more than half the battle. If the Court is made to understand the facts accurately, then in large proportion of cases the conclusions of law follow almost necessarily there from. A second qualification for the counsel in an appellate Court is to be able to state his law points clearly and incisively, referring briefly to the general principles on which he depends, and avoiding as far as possible all tedious references to authorities, which should be set forth fully in his printed brief. Thirdly, the arts of rhetoric are of little avail now a days before our Appellate Courts. A few suggestive illustrations are not out of place, nor should the advocate disregard such care as may be necessary to choose apt language, and to avoid a slovenly or shapless mode of utterance of his thoughts. Any attempt, however, at declamation, or what is commonly known as aratory, before an Appellate Court is wholly out of place, and tends to bring the lawyer who uses it into disrepute with the Court. Appellate Judges are very sensitive to any apparent attempt to appeal to their emotions by such elocutionary efforts as might be appropriate before a jury, or upon the stump, or even in a legislative debate.

"Finally, it is the duty of the advocate to be truthful and candid with the Court. The duties of Court and Counsel are reciprocal. The Court owes you the duty of a careful, patient and respectful bearing, you owes the Court the duty of candid, truthful statement of facts, and an equally candid and truthful presentation of authorities. The lawyer who acquires a reputation in an Appellate Court of misstating the evidence, or of misrepresenting the authorities, soon loses the respect of the Court, and is hampered by a presumption against him in the presentation of his cause. On the other hand, a lawyer who is known to the judges as a habitually truthfull and straight forward in the presentation of a case, starts with a presumption in his favour, which from the mere stand-point of expediency, aside from the stand-point of professional ethics, is of the highest value. I do not mean however, by calling attention to the question of expediency, to slight the importance of professional ethics. Nothing is farther from the truth than the common im-

pression among laymen that the lawyer regards everything as a justifiable that aids him in winning his cause. On the contrary, no honorable lawyer will intentionally misstate the evidence, or misquote an authority, or pervert or distort a principle of law for the purpose of temporary success in the case at bar."

## CHAPTER 110

### Arguing a Law Point

To raise a law point is easy but to argue it successfully requires deep study of the point involved and the law bearing on the subject in all its aspects. It requires as careful attention as the facts, sometimes more. If the point is merely a technical one, the judge will look askance at it especially when the case for the prosecution or plaintiff is very strong on facts. It is not worthy that very few law points are pressed in the trial Court. There is a mistaken belief that such points are reserved for the High Court Lawyers only. Many a case bristle with technical points of law but some how they are ignored. The Privy Council has recently laid down that it is not sufficient that justice should be done to an accused person but it is essential that legal procedure should be conformed to. It is a great asset to the lawyer conducting the defence if he does not "take advantage of a law point that goes to the very root of the case. Question of want of sanction, illegality of search or competency of complainant to file the complaint may end the criminal proceeding in no time. Similarly, in civil cases a question of estoppel or *resjudicata* competency of a party to enter into a valid contract if properly raised in the Court of first instance may sound the death knell of many civil cases. The question of admissibility of oral evidence and bar of S. 92 Evidence Act may finish a number of cases. But this requires a careful study of law and its applicability at the proper stage of the case. "No man can be a great advocate who is no lawyer. The thing is impossible." This is literally true, and "the sooner the advocate realizes the fact the better." *Hardwicke P. 402*. A good knowledge of law is essential for a successful lawyer. I have heard many a lawyer boast that criminal law is nothing but common sense and no books are needed for the criminal practice. I can only say that they are sorely mistaken and that they will realize sooner or later that they were under a delusion."

"The proper study of a lawyer is law. An advocate can never hope to become successful in the argument of questions of law unless he is a good lawyer. How some men get on at the bar is a mystery. They rarely read law, and they often make themselves ridiculous in Court by attempting to talk about something which they do not know anything about. As long as 1828 Mr. Park computed the number of points in a moderate law library at about two millions and a half. This computation was made sixty-six years ago, and, owing to the changes in the law continually taking place, will continue to multiply. Diligence thus in the acquirement of legal principles is indispensably necessary to every lawyer who would be heard with attention by the Court." (*Hardwicke, p. 404*).

A lawyer should be so trained as to think distinctly and remember accurately."

Warren says. "This [is] quality essential, of course to the successful study of any science; but there are reasons why the want of it is peculiarly felt by legal students, and why its attainment is a matter of great difficulty. It is certainly a much rarer quality than is generally imagined—and he is often

signally destitute of it, who is least conscious of the fact. The very nature of legal science contributes to this—for its general principles, though their deep foundations are reason and justice, and fettered and restricted by such subtle distinctions—they admit of such endless exceptions and modifications, as often to prevent anything like a clear and distinct knowledge of their proper character and functions, at least in the case of beginners. The science of the law thus apparently expands into a vast series of details—details barely distinguishable from one another by the most practiced powers of discrimination. The facts again,—often imperfectly stated,—are always varying frequently only by shades of difference scarcely perceptible; and are sometimes so perplexed and intricate that unless extraordinary effort be made, the mind loses sight of the governing facts—the leading details—and floats away amid a haze of minor circumstances. The requisite accuracy of discrimination the student is too often indisposed to give, chiefly because he is distracted and confounded with the vast numbers-variety and difficulty of the topics he has to deal with—of the knowledge ever to be yet acquired, and is apt to make eager, and hasty efforts to 'get over the ground'—without pausing to reflect how, or advertent to the possibility of his having to traverse it again. He is perhaps inclined to rest satisfied with a mere glance at his subject, if he can by that means get rid of the individual emergency—and procrastinate thus from day to day, from week to week, from year to year, the task of going a second time over the ground, in order to acquire a better knowledge of it. He may be compared to a glutton, whose object is quantity, not quality,—the greatest quantity devoured in the shortest time."

Warren says: "The necessity, too, which has been elsewhere alluded to, of rapidly passing from one subject to another, in actual business, is another fertile source of indistinctness and superficiality. Students and young practitioners, not calm and confident in their own resources—not sufficiently stored with accurate and well-arranged information, nevertheless, somehow contrive to find themselves in perpetual bustling activity—ever 'up and doing.' They do little more, for instance, than hastily cast their eye over the marginal abstracts of the New Reports, even of the most important decisions—or deposit them, it may be, in some text-book, resolving to recur to them at a more 'convenient season'—relying upon finding them there where wanted, ready for use; and making thus no effort to incorporate each new ingredient with the existing stock of their knowledge. Can it be wondered, at that such people—'Lawyers in haste'—are always confused and overwhelmed. Such persons have a faint recollection on a question being asked which requires a prompt and accurate answer of a particular decision—they 'know there is such an one'—but they are 'not quite sure what was the precise point decided'—'satisfied it was something—nay, a good deal—like the present', etc., etc. A short time ago, a young barrister cited a case in Court very confidently as deciding—so and so; but on the judge asking him to point out the case, and hand up the report, our friend found, to his unspeakable mortification and alarm, that he has presented the case as exactly the reverse of what it was. The judge looked somewhat distrustfully on the embarrassed counsel, admitted his explanation, but cautioned him to look another time before he leaped. Now let our student keep this little instance in view, while dealing with the slippery matters of law. Surely five leading cases, recollected with accuracy, are worth five hundred imperfectly understood. Attentive reading, frequent reflection upon whatever is read, and application of it to business are the only guarantees of distinctness of thought and recollection."

"The force of a precedent resides in the rule of law which it enunciates. But recitals of facts in the judgment, though important as defining the exact boundaries of the legal question upon which the decision turned, do not however constitute a part of the adjudication." (Blackstone, 39).

## CHAPTER 111

### In Civil Cases

The hearing of a suit is regulated by Order 18, Rule 1 of the C. P. Code which provides that plaintiff has the right to begin unless the defendant admits facts alleged by the plaintiff and contends on either any point of law or on some additional facts led by the defendant. Plaintiff is not entitled to any part of the relief which he seeks in which case the defendant has the right to begin. Rule 2 provides that the party having the right to begin shall state his case and produce his evidence in support of the issue which he is bound to prove. The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case. The party beginning may then reply generally the whole case. It is in the option of the parties to argue their case when the evidence has been closed. It is for them to decide whether they will exercise that privilege or not. In 1924 Lah. 107:4 Lah. 364, it has been held that a Court cannot deliver judgment without hearing the arguments of the parties. But it will not be acting irregularly where the parties having had the opportunity did not choose to avail of it. It is a common error prevailing in Courts that written arguments are made as good substitutes for the oral address in a Court of Law. The practice of submitting written arguments in case is not proper and in any case must be first submitted to the other side and then to the Court. 1923 Mad. 1130 or 1921 Cal. 426. Where no cases are got in reply the party will be allowed to address the Court on such new causes and on the points not argued before the Court previously. 9 Cal. 14. A judge who has not heard any part of the evidence, and before whom no part of the proceedings has taken place, is not justified in proceeding with the judgment until he has given the parties an opportunity of hearing before giving and studying their case. A judgment so pronounced is bad in law and must be set aside on appeal. 91 P. R. 1904. Where a number of pleader are engaged for a party, only one pleader will be allowed to argue the case. 8 Bom. H. C. R. 241 (244). For other hints on arguing the case generally see Chap. 107, *supra*.

## CHAPTER 112

### Opening the case statement of facts.

Order 18, Rule 1—30, Civil Procedure Code sums up the law regarding opening the case by the party.

On the day of trial, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case. The party beginning may then reply generally on the whole case (O. 18, r. 2, C. P. C.). In Calcutta the following has been added to O. 18, r. 2:—"Notwithstanding anything contained in clauses 1 and 2 of rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded and may also allow either party to produce any witness at any stage of the suit." The plaintiff has the right to begin unless the defendant admits the facts alleged

by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. (O. 18, r. 1). Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case (O. 18, r. 3).

As to the right to begin. Best says: "It is sometimes said that as the plaintiff is the party who brings the case into Court, it is natural that he should be first heard with his complaint; and in one sense of the word the plaintiff always begins; for, without a single exception, the pleadings are opened by him or his counsel, and never by the defendant or his counsel. But as is agreed on all hands, the order of proving depends on the burden of proof, if it appears on the statement of pleadings, or whatever is analogous thereto, that the plaintiff has nothing to prove,—that the defendant has admitted every fact alleged, and taken on himself to prove something which will defeat the plaintiff's claim,—he ought to be allowed to begin; as the burden of proof lies on him. The authorities on his subject present almost a chaos. Thus much only is certain, that if the onus of proving the issues, or any of the issues, however numerous they may be, lies on the plaintiff, he is entitled to begin, and it seems that if the onus of proving all the issues lies on the defendant, and the damages which the plaintiff could legally recover are either nominal, or mere matter of computation, here also the defendant may begin (Best s. 637: see also Tay. ss. 378-384; Arch. Pl. 627-31).

Sir Tej Bahadur Sapru in his note appended to the Report of the Civil Justice Committee (p. xxx) says: "They very seldom follow the Code of Civil Procedure in the matter of the opening of a case. They have inherited the notion from olden times that it is a waste of time to have a case opened by counsel. The result of this is that it is very seldom that one comes across a trial judge, who during the trial of the case knows precisely what the points at issue are and who can give decision on the spot as to whether a particular evidence sought to be introduced in the case is or is not relevant. I have come across a number of subordinate judges who are in the habit of disposing questions of relevancy or admissibility raised during the trial by the convenient formula "admitted subject to objection at the hearing." On various occasions strong objection has been taken by the High Court to this slovenly practice, but I am afraid it has had little effect."

It is important to create first impressions and this is secured by skilful opening of the case. The chief object is to create a favourable opinion of the case at the first opportunity. Preparation is the foundation of good advocacy and the importance of preparing the facts has already been discussed in a previous chapter (*ante* p. 41). An advocate can never open a case in an impressive manner unless he has himself a clear idea of the facts and builds his own theory on it. Judge Miller of America says: "The counsel whose duty is to make the opening for his side of the case should have a clear theory of that case—a theory around which he should group all the facts which he admits as established for the other side, and those which he relies on as proved by his own." "To enable the Judge or the jury to understand



fully, and appreciate correctly, the force and value of the more elaborate argument, it is necessary, in the first instance, to give a clear view of the aspect of the case, of the matter to be decided, and of the elements of which that decision must be composed. The object is not successfully attained either by the announcement that certain abstract questions of law are necessary to be decided in the judgment to be rendered, nor that certain items of evidence will be introduced" (Rhetoric as an Art of Persuasion). The statement of the case should be brief and should lay bare the outlines of the case with precision and perspicuity. It should not be inordinately long, nor should it be spattered with arguments. To ensure quick appreciation, the main facts should be arranged in orderly succession and emphasis should be laid on the strong points. One strong point is better than ten doubtful ones. The presentation should be such as to arouse interest in the case. The chief thing is arrangement, order, precision and lucidity. A clumsy statement of facts will create the opposite of what you intend to accomplish, viz., an unfavourable opinion of your case. A misstatement of facts, an inaccuracy, a single false step, will mar your object and confuse the tribunal. Judge Dillon says that "a case ought to be opened leaf by leaf, as a rose unfolds." Repetition or irrelevant facts should be carefully avoided and the principal facts should be mapped out accurately and the line along which you intend to travel should be made plain. Bear in the mind the issues and the evidence which will substantiate them and this will clarify your ideas. Never exaggerate facts or indulge in high-flown language. State your case in the simplest possible words with all the earnestness that you can command. An opening is not intended to be an elaborate production. What is needed is a simple narrative of facts in as few words as possible, giving an idea of the exact nature of the case. "Counsel in opening states the facts of the case, the substance of the evidence he has to adduce, and its effect on proving his case, and remarks upon any points of law involved in the case. Counsel may in opening refer to those facts of which the Court takes judicial notice. Neither in the opening nor at any stage of the trial may counsel give his own personal opinion of the case or mention facts which require proof, but which it is not intended to prove, or which are irrelevant to the issue to be tried." (Halsbury, Vol. II, s. 685).

As a rule, an advocate should not in his opening statement worry himself with the case of his opponent by anticipating defence. He may have a knowledge of the defence as disclosed in the pleadings, but he has no idea as to how would the case be presented, or on what points would his adversary rely. There are no doubt cases in which some advantage may be gained by anticipating a defence and attempting to break it down. It is not a bad policy to take the wind out of the sails of the opponent, if it can be successfully done at this stage. But in the majority of cases, it is injudicious to anticipate defence when opening the case. The opponent will in due time present his case and indicate the lines of defence and plaintiff's advocate can then offer blows. There may be facts favourable to the opponent, but if the defence be anticipated, there is a great likelihood of their being brought to prominence while presenting plaintiff's case. This procedure not unfrequently stands in the way of creating a favourable impression of plaintiff's case, which is the principal object of opening the case. If it is all necessary to state facts favourable to the other side when opening plaintiff's case, it should be done fairly, but care must be taken that the facts favourable to the plaintiff are not put in the background. The opening statement of plaintiff's case is intended to make a favourable impression and so an advocate cannot be charged with unfairness, if facts



unfavourable to him are not touched in it. It professes to be the statement of one side only. The other side will have his turn and his case will then be presented in the best possible manner. The questions of fact and law should be stated briefly and clearly. Cox says: "Then taking each of these questions in turn, state in the form of narrative the proofs you propose to produce in order to its establishment; and in so doing be very careful to show no misgivings about it by anticipating objections, apologising for defects, or making an effort to give weight to certain witnesses, for you must assume that they are unimpeachable until they are shaken by your opponent, and their testimony to be conclusive until it is shown to be otherwise" (Cox's Advocate). "The best authorities are not agreed as to whether an advocate should anticipate his opponent and state the arguments which he will probably make, or refrain from doing so. Both methods have their advantages and their disadvantages Charles James Fox, one of the most accomplished debaters of modern times, was accustomed to state the arguments of his adversaries with greater strength than they could state them and then demolish them, but the course is not always wise especially in the opening statement, for an advocate may state something which would not have occurred to his opponent" (Hardwicke, p. 39).

Lord Brougham in his defence of Queen Caroline, commented with great effect upon the opening statements of Gifford, the Attorney-General, who had stated much too strongly the evidence of adultery which he said he would introduce against the Queen. He comments upon the discrepancies mentioned thus:—"He meant to point out the parts of his learned friend, the Attorney-General's opening statement, which, instead of receiving support from the evidence, were either not touched upon by it at all, or actually negatived out of the mouth of his own witnesses."

"Their Lordships would perceive that every one of these assertions in his learned friend's speech rose one above the other in successive height, according to their relative importance, and even the lowest of them it was of essential importance to sustain by evidence for his case. But every one of them he not only failed to prove as he promised to prove by evidence but he actually negatived some of the most material of them by the witnesses whom he had produced at the bar evidently for the purpose of substantiating them. When the witness Demont was at the bar, he repeatedly asked her respecting these parts of her statement, but she who was destined to tell them all, denied any knowledge of where the Queen went to on that particular night alluded to. She denied that she knew where the Queen went after she left her bed room" (Hardwicke, pp. 35, 38).

"In his opening speech the advocate should be careful not to expiate at length upon the weak points of his own side, nor dwell long upon the strong points of his adversary. He should also be careful not to go outside of the record, as many advocates do in their opening speeches, for the judge or the vigilant opposing counsel will ask him to confine himself. We once heard Mr. Joseph H. Choate ask his adversary not to *testify* himself, but to allow his witnesses to do so for him. Every time an advocate is corrected in this way, he is injured in the estimation of the jury. The jurors think it an attempt to bring something into the case that should not be brought in, for the purpose of deceiving them, and they resent it accordingly" (Hardwicke, p. 48).

The following illustration from Cox's "The Advocate: his Training, Practice, Rights and Duties" will show how to open a case in short and

intelligible manner :—" ' Gentlemen of the jury,—In this case John Doe is the plaintiff and Richard Doe is the defendant. The action is brought to recover damages for a trespass by the defendant upon certain premises of the plaintiff, in Ide, with county of Devon. The defendant has pleaded : (1) That he is not guilty of trespass ; (2) That he entered the premises in question by leave and license of one James Brown, who was the tenant in possession of the said premises. To the second plea the plaintiff has replied that said James Brown was not in lawful possession of the premises, nor entitled to give such leave and license, and these are the questions you have to try.'

A statement somewhat in this form might be made with equal ease, however various, complicated, or technical the pleadings, and indeed, some such sketch of it must have been drawn in the pleader's mind, or set down upon his notes, before he put it into technical form.

As a general rule, the statement of the case for the plaintiff should be calm, temperate, and dignified ; orderly in arrangement, lucid in language, and as brief as the facts to be told will permit. Remember that a plaintiff is supposed to come into Court to demand redress for a wrong done to him : he is there of his own will, invoking the aid of public justice to procure compensation for his private injury. You cannot more effectually awaken a sympathy for your wronged client and indignation against the wrong-doer than by a simple description of the injury and a careful abstinence from angry comments, personal abuse, and other indications that revenge rather than redress is the plaintiff's object. An orderly and lucid statement of the case, keeping as closely as may be to the order of time in the relation of events, is almost always desirable ; because a plaintiff, who is the mover in the action, and comes voluntarily into Court, may be supposed in most cases to have the right on his side, and always to have some probable foundation for his claim. So that it is very rarely his policy to throw a fog about the case.

You will begin, of course, with an account of the parties, who and what they are and the circumstances that led to the present dispute ; then you will state with precision the nature of the dispute itself, and whether it is upon a question of law, or of fact, or both, with the very points at issue,—the one for the information of the Court, and the other for the information of the jury, that attention may be directed more readily and surely to your evidence as it bears upon these points. Of so much importance is this that you should take some pains by previous preparation to put them into the most distinct shape, and you should repeat each one *toidem verbis*, whenever you introduce your statement, and when you close the evidence that bears upon it. Then taking each of these questions in turn, state, in a narrative form, the proofs you propose to produce in order to its establishment, and in so doing be very careful to show no misgivings about it by anticipating objections, apologising for defects, or making an effort to give weight to certain witnesses, for you must assume that they are unimpeachable until they are shaken by their opponents, and their testimony to be conclusive until it is shown to be otherwise. If you display the slightest doubt about your own case and your own witnesses, they will be at once suspected to be far worse than they are, they will be heard with a prejudice against them, and small errors which, unsuspected, would not have been noticed, are instantly enlisted to confirm this foregone conclusion. Hence, too much emotion, too much anxiety, too much elaboration, and too much effort, in an opening speech, are calculated to damage the cause, by exciting a suspicion that it is not so good a one as it

should be. And then it becomes a difficult task to combat a prejudice as well as to convince. You should reserve your energies and your eloquence for the *reply*. Now to make any narrative clearly intelligible, the first care is to observe, as closely as possible, the order of time in detailing the events. You will commence, of course, with a description of the parties, who and what they are, with the addition of any circumstances in the position of either of them which may affect the case by explaining subsequent transactions, or aggravating the damages. If locality is in any way concerned, describe the *locus in quo*, and, if possible, in all cases use a map for this purpose. The rudest drawing of a place is more intelligible than any verbal description; and it has the still more important use of at once arousing, and fixing upon the story, the attention of the jury. Having described the person and the place, take up your narrative at such period preceding the immediate matter in controversy as may be necessary to explain the cause of it, to use a legal phrase, begin with the inducement. Show how it was that the conflict arose. Then describe minutely, with careful reference to the plan, if there be one, the subject matter of the dispute, and the precise questions which the jury will have to determine in relation to it. This done, you will proceed to state your case, the facts and arguments upon which you rest your claim to the verdict. Advocates do not always make this statement in this part of their opening. Often they reserve it for the close, preferring first to state their evidence. But consulting, as before suggested, one's own mind for the manner in which conviction is most readily produced, it appears that, to make the account of the evidence easily intelligible, it is necessary to have such a previous view of the facts as might enable us to discern the bearings of the promised testimony. We would, therefore, earnestly recommend you to adopt, as an invariable rule of your practice, the plan of preceding your statement of the evidence with a succinct narrative of the facts and the arguments you found upon them, briefly set forth, and then to proceed to describe the testimony by which, as you are instructed, you will establish those facts. This accomplished, and not before, you should proceed to state the particular evidence by which you propose to establish the facts you have detailed; and in arranging your statement you will often have this difficulty to encounter—the same witness will sometimes speak to different parts of the transaction, and the question occurs whether it is the better course to deal with the whole testimony of the witness at once and dismiss him, or to confine the statement to so much of it as comes in order of time and introduce him again when he is wanted. But this often recurring source of perplexity will be entirely removed by observance of the arrangement above proposed. Having stated, in a narrative form, the whole story intended to be proved, with the argument founded upon the facts, apart from any particular proposed proofs, and the jury being thus already in possession of the facts and their mutual bearings, all that now remains for you to do is to introduce to them the persons and documents by which you hope to establish the case you have already painted upon their minds.

“In concluding your opening, it is rarely prudent to do more than briefly repeat the outlines of your case and especially so much of it as goes to aggravate damages, winding up by a calm assertion of your confidence that if you establish the case you have stated, you will be entitled to their verdict. Anything in the shape of a formal peroration, and especially any display of eloquence at the close of an opening, is out of place and in bad taste, and only permissible in a few exceptional cases, of which it must be left to your discretion at the moment to determine.”

The following rules with regard to the statement of the case are taken from an American book "Work of the Advocate" (1888 Ed. p. 207) by B. K. Elliott and W. F. Elliott. 1. The opening of counsel should ordinarily consist of a comparatively brief statement of the nature of the action, the substance of the pleadings, the issues to be tried, and the facts expected to be established. 2. Counsel should not be permitted to rehearse the evidence at length, but should be confined to the statement of the facts, and only such facts, as a rule, as may fairly be shown under the issues. 3. The limitation and regulation of opening statement must rest largely in the discretion of the trial Court, subject however, to the revision power of the higher Court for abuse thereof. 4. Where counsel exceeds the proper limits in opening, an objection should be made, and an exception taken to the ruling of the trial Court, in order to present the matter on appeal. 5. Counsel in his opening statement, should be careful to base his action or defence on a tenable theory, and to state his entire claim."

### CHAPTER 113

#### Opening the case by Defence

Regarding opening the case by defence, Harris says: "The first point to decide is at what point to commence the attack. A great deal may depend upon this. You may expend much energy in fruitless work. The weak places are undoubtedly attractive, but, as a rule, should be reserved, because at a later period the effect will be greater and the demolition *appear* to be more complete. Attack, therefore, the strong points first, but not by direct blows. You cannot knock down a substantial wall by butting your head against it. There are improbabilities and inconsistencies, perhaps, or partialities to deal with. You may possibly get these and shake the very foundations on which the whole fabric rests. Having disposed of the weaker points of your opponent's case and attacked the strong ones by well arranged argument, the next duty will be to present your own facts, and in doing this the great rule to observe is to *arrange them with due regard to probabilities*. This is not always alone; it is sometimes not even thought of. The same facts may be so ill-arranged, that collateral circumstances (never to be lost sight of, though irrelevant as evidence) may raise the strongest improbabilities against you. On the other hand by a skilful arrangement the opposite result will be produced." *Harris' Advocacy*, Pp. 162-166.

"The plaintiff's case being closed, that of the defendant begins. You will open with an address to the jury in which you comment upon the case as disclosed by the plaintiff, and state the case which you propose to produce in answer to it. Herein does it differ materially from the plaintiff's opening, for whereas his counsel properly confines himself to a statement of the facts, reserving commentary for his reply, the defendant's counsel must perform the double duty, and combine the spirit of a reply with the calmness and clearness of an opening. It is his single opportunity for addressing the jury, and he must use it to travel over the whole case, with comment, not only upon that which has been proved, but also that which yet remains to be proved, and which may or may not answer to his anticipations. Hence the difficulty of a defence. It is usually said that a reply is the test of ability; and so it is in *debate*. But the saying has been inconsiderately extended to forensic oratory, in which the circumstances are very different. In debate there is no necessity for anticipating the production of facts, which may not be proved after all, and dealing with them as if

proved. To answer the argument on the otherside, and urge his own reasons, are all that devolve upon the debates. But at the bar the counsel for the defendant must do all that the debater is required to do, with the additional difficulty that he must state a case that will be an answer, and yet must state it so that a failure in proof of parts of it shall not be destructive to the whole; for one of the first lessons of experience in advocacy is the little reliance to be placed on *instructions* not from any fault of the attorney, but because witnesses from many motives, are wont to make to the attorney in his office a statement very different from that which they will venture, under the sanction of an oath, with a cross-examination in prospect, and with the eye of the public upon them.

"As a general rule it may be desirable to treat your subject in its natural order, that is to say in the order in which it has been already presented to the minds of the jury, unless some special reasons exist for dealing with it otherwise. Bear then, this in mind, when you rise to open a defence, that you are about to comment upon a story already known to the jury, that is your business to convince them that this story is not credible, by reason either of its own intrinsic improbabilities, or of the insufficiency of the testimony by which it was supported, or of the little faith due to the witnesses, or of the contradictions which you purpose to produce. In order to remove the impressions made upon their minds by that story, you must ask them to review it with you and to do this you must recall it to them; and as we have sought to show you, it can best be recalled in the order in which it was imparted to them. There occurs another question, upon which there is some difference of opinion even among experienced advocates, namely, is it more prudent to recall the whole of your adversary's case, its strongest as well as that which you can; or, to pass over that which tells against you, and to dwell exclusively on that which you can meet? On the one hand, it is said that, by reviewing the strong points, and leaving them unassailed, you not only recall what may have been unnoticed, but you give them double significance by the confession of their strength, implied in the inability to answer them. On the other hand, it is argued that not to notice them at all, is to admit them to be unanswerable and destructive, and thus to concede victory. This is a dilemma of such frequent occurrence that we should have been very glad if we could have discovered any rules for guidance in the choice. But we have endeavoured in vain to do so. Even after the experiment has been made, and with reference to the results of actual experience, we are unable to say which course has the balance of reason or the proof of practice to recommend it. Much must depend upon the particular circumstances of the case, upon the impression apparently made upon the jury, upon the nature and worth of the answer you are about to put in."

"As a general rule, it will be the more prudent course to begin with a review of the case as disclosed by the plaintiff, and then to state your own case; but to this there will be exceptions under special circumstances, some of which we will notice presently. Take the story as it was told, not strictly observing the order of witnesses, but rather the order of time. A favorite and often very effective opening of a defence is an allusion to the highly-colored assertions of the counsel, for the plaintiff as compared with his proofs; for seldom, indeed does the sifter

evidence quite fulfil the promise of the opening. Reminding the jury of this, you disturb their confidence in the case already submitted to them; and you conciliate their good-will to give you, who appear as an injured party, at least a fair hearing. Then travel carefully through the case, restating it with your own comments, and according to your own view of it, thus presenting it under a different aspect. Take care that no weak part of it escapes your notice. Point out its shortcomings. Show not only the worthlessness of what is proved, but show much more might and should have been proved. Of nothing does a skilful advocate take more advantage than of omissions of evidence, and nothing is more telling with the jury to the disadvantage of the party so complained of; a motive for withholding the witness is always, and not unreasonably, suspected, and of that suspicion it is permissible to avail yourself. Then you must show, if you can, that the evidence upon which you are commenting does not bear the construction intended to be put upon it that may occur to you. But observe that, in the performance of this portion of your task, great caution will be necessary on your part to proceed upon substantial grounds, and only to put forward objections that have some show of reason and good sense in them. Criticism that is obviously frivolous will recoil upon yourself and damage you much more than your adversary."

"Another very important rule is, not to perplex the jury with too many defences. Even if you have many answers, it will be your truest policy to take the strongest and best, and rely upon that, or, at most, upon two or three, if they be very conclusive: but let it be an inflexible answer with weak and subtle ones. One in a thousand times you may lose a cause by omitting to bring forward some other weak defence, after having thrown yourself upon your strong one; but for one that this is likely to happen, you will twenty times lose the verdict your strong defence would have secured, had you not weakened it by tacking to it some other more refined, and, therefore less intelligible one."

"The art of a defence consists in battering down your adversary's case, and erecting your own upon its ruins. This shows you the proper order of your strategy. You must first attack the case on the other side, and shake it to its foundations before you attempt to lay the foundations of your own. Yet, apparently obvious as is this policy of a defence, how often is it neglected; and the listener in our Courts will hear the attack and the defence, the facts that have been asserted and those that are to be proved, mingled in the speech to the detriment of both and to the perplexity of the jury. Pray you avoid it. Spare no pains for the weakening of your adversary's case, by making plain to the jury every flaw in it your ingenuity can find. Never neglect this portion of the duties of a defence, for you know not what may be its value, if it may not be your reliance at last. This, at least is yours; of such advantage as can be had from it you are certain; nothing can deprive you of that. But your own case, however apparently strong, is never secure until it is proved; it may break down at last, from circumstances you could not anticipate nor control, and then your only hope will rest upon the damage that has been done to the case of the plaintiff. Remember that it is upon the other side that the onus of proof usually lies. It is for the plaintiff to make out his case to the satisfaction of the jury, and if he fails to be equally unable to prove what you had expected to prove, still you will be entitled to the verdict. Therefore it is that a sagacious advocate always, in defences, throws his whole strength into the attack, and permits no weak

point, in the sum or in the details of proof, to escape his criticism. He will labor at this, while often he will pass lightly over the evidence he proposes to produce on his own part leaving the later to tell its own tale, if it is strong, and covering its defects if it is weak. In commenting upon evidence, you may criticise either the evidence itself, or the witnesses or both. You may take the case either in the order the witnesses were examined, or in that of time, according to the story. The latter is perhaps the more intelligible arrangement for a jury. You will be guided by circumstances in your choice, each case having its own considerations in this respect, which no general rule could anticipate. In dealing with the evidence of witnesses, your sagacity will be exercised in detecting and exposing contradictions, improbabilities, and statements at variance with the evidence of other witnesses. No portion of the duties of an advocate opening a defence are so effective as this."

"You will now proceed to open your defence; to state what is the answer you are prepared to put into so much of the plaintiff's case as requires an answer. In your commentary upon it you have shown what of it was untenable, what unproved—what had, in fact, answered itself. You have now to show the means by which you propose to defeat by evidence that which you were unable to beat down by argument. Here, also, your task is more delicate and difficult than that of the counsel who opens a plaintiff's case. Great caution is required; some tact is to be exercised; your judgment must be ever on the watch to control your tongue. You must be careful to state no more than you are confident of being able to prove; you must avoid unnecessary proofs—by which we mean, the proving of that which is not denied, or not relevant, or which is already established by the witnesses on the other side; for an unnecessary witness is always dangerous; once in the box he is equally the property of your opponent, and you cannot know what damaging facts may be obtained from him in cross-examination. It, on the other hand, you refer to him in your speech, and afterwards omit to call him, you expose yourself to put the worst construction upon this discrepancy between promise and performance. In stating your defence, if it is a strong one, it is desirable briefly to recall the parts of the plaintiff's case to which it is an answer, by which you impress it the more forcibly upon the jury; and this should be done, not by stating all of the plaintiff's case at once, but each part of it that you refute, in succession with the answer following immediately upon the fact; for juries cannot pursue a train of argument, nor even carry in their minds many successive facts, so as to apply a succession of other facts to those which have preceded. "And your statement of facts—that is, the opening of your defence—should be, like all statements of a case, plain, perspicuous, and unimpassioned, but also pictorial and dramatic. There must be no effort to be oratorical, no flight of eloquence or poetry, no appeal to the passion—only mere narrative, told in the language most intelligible to unlearned ears, delivered in a conversational tone, and in the manner of one telling a story."

"Having concluded the statement of your case, you will then proceed to make application of it to the case of the plaintiff, showing how triumphantly it will answer this point, how it will demolish that one, how little remains unshaken, and how worthless that little is. Here it is permissible to be somewhat discursive; to call in the aid of any acts of oratory that may be apt to the occasion, for the purpose of yet more damaging the case of your opponent or invoking a favourable opinion of your own. Not the least of the difficulties you will feel is to decide the best manner of dealing with so much of the plaintiff's case as you are able to answer only partially and



imperfectly. That it is that will test your tact and discretion. The parts to which you have no answer you will of course pass unnoticed. But the most cautious discretion is requisite to determine if, and how, you shall deal with facts to which you have not a satisfactory answer. It is impossible to suggest any rule for your guidance in these circumstances. You must rely upon your own tact at the moment, to determine you how to treat them. This is an art which experience alone can teach, and we cannot do more than remind you of the existence of these difficulties, and of the capacities that will be required of you to meet and overcome them."

"While arguing defendant's case it should be remembered that the right of reply is in the plaintiff and it is therefore necessary to forestall all possible objections that may be urged against him. Both sides having stated their cases and the whole evidence being before the parties, it is not very difficult to anticipate the points that go against the defendant. This is the time for taking stock of the whole situation and to display one's power of reasoning. Collateral facts might not be of much value when taken by themselves, but when fitted in with the material facts, they may render a thing highly probable. The weakness of the case should not be passed over without suitable explanation. The other side will have discovered them and when plaintiff's time comes, he will try to make the best use of them. The strong points should be placed in the forefront and forcibly impressed upon the Judge. In addressing the Court, the advocate should remember that judges, having highly trained minds, usually understand what is said to them without difficulty, no matter how technical the language used, while in arguing a case to the jury he must use as few technical words as possible, and explain the few that he does use. In the argument to the Court he need not usually state his propositions more than once, while in his address to the jury he will often be compelled to repeat them under different forms" (Hardwicke, p. 390).

## CHAPTER 114

### Concluding Address Illustrations

Sometimes wonderful effect is created by the manner of your concluding speech to the Jury. The last words ring in the ear if they are thoughtfully chosen for the occasion. The last impression is always the best. In your concluding address you must give the short summary of your speech and wind it up in a graceful and effective manner. Here are few illustrations of the concluding addresses by eminent counsels:—

Mrs. Thompson was committed to stand her trial on 6th December, 1922 on a charge of murdering her husband. The excluding address by Sir H. Ourtis Bennet was to the following effect:—"It will be for you to say whether the arguments I have put forward for your consideration are well founded or not. It will be for you to say, when you have heard the Solicitor General address you again on behalf of the Crown, whether the prosecution have proved that either of these people is guilty of murder. I am only concerned with Mrs. Thompson. It will be for you to say whether she is guilty of murder, of whether all the prosecution have done is to show you a cloud of prejudice, and whether it may or may not be that upon some other indictment she may be found guilty. I have submitted as plainly as I can that upon this indictment, not only have the prosecution not proved she is guilty, but if you go through these letters and discuss them you will see they are quite consistent with the view I have put before you, and much more consistent, because there are many more references to running away and spending time together in the future, and waiting those three or five years; that



all these letters are consistent with the innocence of both the people in this trial. As far as Mrs. Thompson is concerned, you do not have to consider the case against her until you are satisfied beyond all reasonable doubt that Bywaters is guilty of murder, a decision which, in my submission to you, you will never come to when you consider your verdict. I am loath to leave this discussion, because I am anxious to feel and know that I have dealt with the whole case as it is put against Mrs. Thompson. I know I have risked your displeasure in taking up your time at such length, but you do not grudge a few hours one way or the other spent on something which means eternity. Of course, I cannot see what is in your minds, because I cannot tell whether the matters I have been discussing are matters that you don't want to discuss because you have made up your minds. But in asking this question I know one thing; I shall get your answer, and the answer to the question I have put is the answer that Mrs. Thompson is not guilty."

2. In the famous trial of Sir Roger Casement for treason, the defence counsel Mr. Artemus Jones appealed to the Jury, in his concluding address thus:—"I am not going to make any appeal to you on behalf of the prisoner which is founded upon anything except those considerations that the law allows. I am not going to address you upon the terrible responsibility that rests upon you in considering this case. It is, as I said before, a matter of life and death, and it would ill become me to dwell upon that aspect of the matter as far as you are concerned. I spoke just now of the responsibility which devolves upon counsel who are pleading for the life of a fellow-creature. That responsibility is small compared with your responsibility. Each one of you must be satisfied beyond a reasonable doubt that the Crown have made out their case. The law demands, as the Attorney-General said, a forfeit; but that is not all the law demands. That man has a right to demand from you the same care and scrutiny in weighing the evidence as any one of you would expect to get were you standing in that dock. It is said that life is a comedy to those who look on, and it is tragedy to those who feel. This trial may mean a tragedy to the prisoner on account of the terrible responsibility which rests upon your shoulders. Each one of you must be satisfied, and satisfied beyond all reasonable doubt, that the Crown have made out their case. I am not going to address any appeal to you based upon sympathy or upon anything like an emotional plea in the way of mercy. The ancient and valiant race from which this man so rings does not produce the type of man who shrines from death for the sake of his country. The history of Ireland contains many melancholy and sad chapters, and not the least sad is the chapter which tells and speaks so eloquently of so many mistaken sons of that unfortunate country who have gone to the scaffold, as they think for the sake of their native land. I am not going to base any appeal to you upon emotions. If the Crown have made out their case, it is your duty as lawful citizens to return a verdict of guilty; but I claim this, that the law requires that the Crown should prove their case, and prove it up to the hilt, and you must with sure judgment and with clean consciences consider if you be satisfied upon that point; and if you do that if you approach the case in that spirit and apply that test to it, dark and heavy as the case may be as far as the defence is concerned. I do suggest to you that there is a way open to you to return a verdict which would be none the less just because it is humane."

3. Eugene Aram who was executed on the 6th of August, 1759, for a murder committed on the 8th of February, in the year 1744-45, was allowed to Address the Court in person. He flung a great surprised when he

challenged the identification of the deceased by means of bones. He referred to his good character in his defence as under :—" I have heard, my lord, the indictment read, wherein I find myself charged with the highest crime with an enormity I am altogether incapable of a fact, to the commission of which there goes far more insensibility of heart, more prefligacy of morals, then ever fell to my lot. And nothing possibly could have admitted a presumption of this nature, but a depravity not inferior to that imputed to me. However, as I stand indicated at your lordship's bar, and have heard what is called evidence in support of such a charge. I very humbly solicit your lordship's patience, and beg the hearing of this respectable audience, while I, single and unskilful, destitute of friends, and unassisted by Counsel, say something, perhaps, like argument in my defence.

First, my lord, the whole tenour of my conduct in life contradicts every particular of this indictment. Yet, I had never said this, did not my present circumstances extort it from me, and seem to make it necessary. Permit me here, my lord to call upon malignity itself so long and cruelly busied in this prosecution, to charge upon me any immorality of which prejudice was not the author. No, my lord, I concerted not schemes of fraud, projected no violence, injured no man's person or property. My days were honestly laborious, my nights intensely studious. And I humbly conceive my notice of this, especially at this time, will not be thought impertinent or unreasonable, but at least deserving some attention ; because, my lord, that any person, after a temperate use of life, a series of thinking and acting regularly and without one single deviation from sobriety, should plunge into the very depth of profligacy, precipitately and at once, is altogether improbable and unprecedented, and absolutely inconsistent with the course of things. Mankind is never corrupted at once—villany is always progressive, and declines from right, step after step, till every regard of probity is lost, and every sense of all moral obligations totally perishes. Permit me next, my lord, to observe a little upon the bones which have been discovered. It is said, which is perhaps saying very far, that these are the skeleton of man. This possible, indeed, it may but, then, is there any certain known criterion which incontestably distinguishes the sex in human bones ? Let it be considered, my lord, whether the ascertaining of this point ought not to precede any attempt to identify them.

Now, my lord, having endeavoured to show that the whole of this process is altogether repugnant to every part of my life ; that it is inconsistent with my condition of health about that time—that no rational inference can be drawn that a person is dead who suddenly disappears—that hermitages were the constant repositories of the bones of the recluse—that the proofs of this are well authenticated—that the revolution is religion or the fortune of war has mangled or buried the dead—the conclusion remains, perhaps no less reasonably than impatiently wished for. I, last, after a year's confinement, equal to either fortune, put myself upon the candour, the justice, the humanity of your lordship, and upon your, my countrymen, gentlemen of the Jury."

4. In the trial of George Henry Lamson, the defence Counsel, Mr. Williams the defence Counsel warned the Jury against being influenced by external circumstances or by opinion of the Judge. He said :—" Gentlemen, Juries have made mistakes ; Judges have made mistakes ; and, although Judges tell Juries, and tell them earnestly and sincerely—for the Judges of this country are one of its brightest ornaments—although they tell Juries, intending that the should act upon what they say, not to take any expression

of opinion from them, because the responsibility rests with the twelve men who have to try the case; yet gentlemen, in my humble opinion, when you come to consider that our Judges are in many cases clavated to the bench from being the most successful of advocates and the highest ornaments of advocacy in their profession, you must feel that it is difficult for a Judge, or any human being who has been a successful advocate, and who has been one of the brightest orators of the age, entirely to divest himself of oratory. The lion cannot change his skin the leopard cannot change his spots; and, however unwilling a Judge may be that any sentence or word of his might affect the opinion of the Jury, the tenses that have so long charmed never lose their charm, however much it may be desired—"the right hand" never forgets "its cunning." I make these observations with all sincerity and with all respect, knowing that they will be taken in the sense in which they are meant.

Gentlemen, I now come to what is to me the most painful part of my duty. I have told you that you have the life of my duty. I have told you that you have the life of a fellow-creature in your hands. In reality you have a trinity of lives in your hands. You have three people to consider. This man has a wife. Who stood by him in the hour of poverty? That wife. Did you notice her on the first day? A thin, spare figure came up to that dock and took him by the hand, saying by her presence. "Though all men be against you, though all the world be against you, in my heart there is room for you still." Gentlemen, they say that women are inferior creatures, but in the hour of retribution it may be said of women—

When pain and anguish wring the brow,  
A ministering angel thou.

She had sworn at the altar to love, honour, and obey him. It is well that the compilers of the solemn service put "love" first, for where there is woman's love the others follow, as a matter of course; and up to this moment she has stood, as to speak, by his side. Gentlemen, if the prisoner be convicted, and his life be sacrificed, what a legacy is there for her. What a reward for all her true nobility, and for all that is softest and best in life—a widowed home, a cursed life, and a poor little child never to be taught to lisp its father's name, its inheritance the inheritance of Cain.

I make these observations, gentlemen, not with any desire to make you deviate by one hair's-breadth from the path of duty which you are bound to tread; but I do make them to beg to entreat, to beseech you, with these last tones of my voice, not to found your verdict upon speculative theories and visionary ideas, but to test, and try, and weigh—and accurately weigh—every particle of the evidence—real, solid, cogent evidence—before you come to a verdict antagonistic to this man, into your hands I commend a brother's life, for, no matter what our nationality or creed may be, by the common tie of human nature all men are brothers. I can only beg you, lastly, the extent towards him—your brother—that upon which, in my humble judgment, all true religion is founded, do unto him—your brother, as you would if you were placed in such dire straits, that your brethren should do unto you, and may the Lord direct you right.

## CHAPTER 115

### Model Questions

The following model questions are set forth in order to facilitate the work of the junior counsel. Senior counsel will also find them as unerring guide. These questions are, by no means, exhaustive on the subject, but can serve as an intelligent hints for effective cross-examination.

#### I. In Criminal Trials Generally

1. Was there any delay in F. I. R. ? 1924 A. 441, 25 Cr. L. J. 93, 1924 C. 975 : 51 C. 924, 27 Cr. L. J. 225, 42 C. 784.
2. Was the accused's name mentioned in the F. I. R. ? 93 I. C. 892 : 27 Cr. L. J. 492.
3. Were the names of the witnesses mentioned in the F. I. R. ? 1922 L. 28, 1933 L. 1005, 1928 L. 57, 1938 L. 507.
4. Was the F. I. R. given by one who was not an eye-witness ? 1926 L. 369 : 27 Cr. L. J. 544, 1933 L. 1052.
5. Was the accused's name omitted in the F. I. R. although it was known to the maker ? 1927 L. 149, 1929 N. 222, 1931 S. 13, 1929 P. 712, 1922 L. 28, 1928 L. 880.
6. Whether the F. I. R. was given to the officer in charge of the Police Station ? 1928 C. 771, 42 M. 446, 1933 P. 547.
7. Whether the information was given to the Deputy Superintendent of Police ? 1923 M. 394.
8. Whether the first information report was given at two different places ? 58 C. 1312 : 1931 C. 745, 2 P. 517, 1936 P. 11 : 36 Cr. L. J. 235,
9. Was there any discrepancy between the F. I. R. and subsequent evidence ? 1931 L. 157, 1933 O. 148, 1935 L. 146, 1931 L. 38, 1923 L. 685, 1922 L. 410.
10. Was the information given to the Police by telegram ? 1928 M. 791, 1930 L. 457, 1931 S. 13, 1935 C. 403, 1334 L. 413.
11. Was the F. I. R. given by telephone message ? 1931 S. 13.
12. Whether the witnesses as named in the F. I. R. are produced by the prosecution ? 132 C. 118 : 58 C. 1135, 1934 C. 458. If not, what is the reason ?
13. Was the writer of the F. I. R. produced ? 1935 C. 458, 1920 C. 988. If not, what is the reason ?
14. Was the information of F. I. R. examined as witness ? 1920 C. 988, 1934 S. 100. If not, what is the reason ?
15. Is the witness disbelieved in part, and his evidence is against some admitted facts ? 1924 P. 813.
16. Is the prosecution witness untruthful as to the greater part of his evidence ? 42 C. 784, 55 A. 379, 1931 L. 38, 1933 A. 401.
17. Is the prosecution evidence disbelieved regarding one accused ? 1931 L. 38 : 32 Cr. L. J. 522, 1934 O. 13.

18. Is the evidence of a witness conflicting with medical testimony? 1927 L. 617.

19. Whether part assigned to the accused is falsified by the medical evidence? 1927 L. 617 : 28 Cr. L. J. 685.

20. Whether manipulation in the personnel of the actors in the crime is extremely easy, and is extremely difficult to refute? 1926 O. 120 : 27 Cr. L. J. 529.

21. In case of party factions, is there any corroboration by some document or other reliable evidence? 1927 M. 820.

22. Is the alleged eye-witness inimical to the accused? 1930 L. 311.

23. Does the alleged eye-witness belong to the opposite faction? 1933 L. 311.

24. Does the evidence of a witness stand discredited on a crucial point? 1930 M. W. N. 723.

25. Whether the witness is over-zealous for the party and is exaggerating circumstances? See Taylor 8th Ed., Ss. 44 and 52.

26. Is the evidence of a witness discrepant as to the material part? 1923 L. 195.

27. Whether the statement of a witness is hopelessly in conflict with his previous one. 1925 L. 483 : 27 Cr. L. J. 289.

28. Whether the witness merely referred to certain documents in which he stated his evidence was to be found? 5 L. 396.

29. Whether the evidence is doubtful? 1930 P. 247 : 9 P. 474.

30. Was the accused implicated only when witnesses in a murder case were faced with the necessity of exculpating themselves? 1930 P. 338 : 1930 Cr. C. 710.

31. Whether two sets of witnesses are making divergent statements about one and the same incident? 106 I. C. 800 : 29 Cr. L. J. 208.

32. What were the events preceding and leading up to assault on deceased person? 1934 R. 44 : 35 Cr. L. J. 855.

33. Is the evidence of a witness exaggerated one? 2 Moore. I. A. 126.

34. Is the evidence of a witness of negative character? 15 Cr. L. J. 621.

35. Are there serious omissions in the evidence of a witness? Will's Circumstantial Ev., p. 212.

36. Does the prosecution witnesses deliberately suppress part played by the deceased? 1934 L. 696.

37. Are there any circumstances which lead one to suspect that the real truth has not been placed before the Court? 1935 C. 304.

38. Is there any motive for implicating the accused? 90 P. L. R. 109 : 11 Cr. L. J. 130.

39. Was there any motive for the crime? 7 L. 84, 1932 L. 195, 1927 L. 74, 1935 A. 394.

40. Whether theory of guilt and innocence are both likely? 1925 O. 676 : 26 Cr. L. J. 642, 1930 Cr. L. J. 117.

41. Was the accused identified at the time of occurrence ? 5 L. J. 317.
42. Was the identification made in dark night and accused was not previously known to them ? 93 I. C. 892 : 27 Cr. L. J. 492, 1930 O. 60.
43. Was any description of accused given before identification parade was held ? 1925 L. 426 : 86 I. C. 69.
44. Whether the explanation offered by the accused is satisfactory ? 117 I. C. 212 : 30 Cr. L. J. 727.
45. Have the prosecution witness shifted the locality or place of occurrence ? 1927 L. 617.
46. Whether the accused was mere suspector at the time of occurrence ? 1933 O. 123.
47. Whether the witness is inimical ? 1923 P. 519, 1925 L. 42.
48. Whether the witness is interested ? 27 Cr. L. J. 223, 1922 L. 76, but see 1930 C. 645, 51 M. 956, 1931 L. 529, 1929 M. W. N. 587.
49. Whether the witness is improving upon his former statement materially ? 1934 N. 204, 212 P. L. R. 1915, 31 P. R. 1914 (Cr.).
50. Whether the witness is a mere child and therefore liable to make mistakes and liable to be tutored ? 1929 C. 390 : 31 Cr. L. J. 373, 1933 L. 367, 34 Cr. L. J. 606.
51. Whether the witness belongs to the same caste and community ? 1926 P. 36, 1925 O. 473, 1923 L. 436.
52. Whether the defence witnesses are associates and friends of the accused ? 1913 A. 35 : 24 Cr. L. J. 257..
53. Whether the accused is a chance or *wajtakar* witness ? 100 P. L. R. 1915, 5 L. 396, 1932 A. 322.
54. Whether the witness has changed sides and has made statement in favour of the both prosecution and defence ? 1925 O. 726 : 26 Cr. L. J. 1236.
55. Whether the witness is not reliable and has undergone sentences and who is under Police surveillance ? 1925 L. 397 : 89 I. C. 311.
56. Whether the witness is a debtor of the party ? 1923 R. 30 : 70 I. C. 902,
57. Whether the witness gave the statement to police after a long delay ? 1922 P. 582 : 1 P. 630, 99 I. C. 857, 28 Cr. L. J. 185, 1922 P. 348, 1931 L. 529 : 32 Cr. L. J. 1032.
58. Whether the witness is of low status ? 1924 P. C. 106 : 1935 R. 297.
59. Whether the prosecution witnesses who were on the spot are not produced ? 8 C. 124, 50 C. 318, 7 P. 50.
60. Whether the witness was disbelieved in a previous trial ? 1931 L. 38.
61. Did the eye-witness rescue the injured ? 131 P. L. R. 1915, 100 I. C. 357. (If not, the presumption is that he was not there).
62. Does the witness remember details ? 1935 O. 468 : 36 Cr. L. J. 115.
63. Whether the witnesses are partisans ? 1929 O. 494, 1927 L. 820.
64. Do the prosecution witnesses belong to the family of the deceased ? 1935 L. 130,

65. Is the witness related to the deceased or complainant ? 1931 L. 38, 1935 L. 94, 1935 L. 130.
66. Has the witness resiled from his previous statement ? 1925 M. 835.
67. Is the witness servant of the complainant ? 1922 P. 88.
68. Does the witness belong to the category of stock witnesses of the Police, i.e., *Lambardars*, *Zaildars* and *Sufaidposhes*. 1923 L. 333.
69. Is the witness repeating part like what he is tutored to say ? 1929 L. 587.
70. Is the witness under Police surveillance ? 1925 L. 397 : 26 Cr. L. J. 1335.
71. Has the witness come forward voluntarily as friend or associate of the accused ? 1923 A. 35, 43 A. 186, 1925 O. 473.
72. Is the witness of loose character ? 12 P. R. 1911 (Cr).
73. Is the wound self-inflicted ? See Lyon's Jur. 1935 Ed., p 239.
74. Can prosecution witnesses explain marks of injury on the person of the accused ? 27 Cr. L. J. 821 : 95 I. C. 597, 1933 L. 871 : 35 Cr. L. J. 137.
75. Were the foot-prints of the accused covered ?
76. How long after the occurrence the foot-prints were compared by the tracker ? 1932 L. 557.
77. Whether the foot-prints were of a person running, walking, or with burden or of bare or booted feet or with shoes ? See Prem's Criminal Practice—Foot-prints.
78. Whether deceased was aggressor ?
79. Did the deceased first give the blow or assault and the accused exercised his right of private defence ?
80. How far was the witness from the scene of occurrence ?
81. Whether the witness is weak sighted ?

## II. Abduction Cases

1. What is the age of the girl ? (Consent of girl of less than 16 years is immaterial). 49 C. 905, 1930 C. 437, 1944 B. 159, 59 B. 652.
2. Whether any force or deceitful means was practised on her ?
3. Whether the girl had any love affair or connection with the accused before abduction ? A. L. R. 1933 L. 775, 38 P. L. R. 98.
4. Whether the girl was happy in her parents' home ?
5. Whether she was active abettor in the elopement ?
6. Whether she was carrying on intrigues with the accused before abduction ?
7. Whether she complained about her abduction at the Railway Station, or while passing through various villages or Police Stations ?
8. Whether she complained to anybody when left alone ?
9. What was the intention of the accused ? (Abduction in itself without intention is no offence). 99 I. C. 121, 1934 L. 227, 1924 L. 218, 13 P. R. 1904 Cr., 1934 Pesh. 69, 6 C. W. N. 208.
10. How long she lived with the accused before or after abduction ? See 1924 L. 218 : 24 Cr. L. J. 421.

11. Whether accused had knowledge or intention that she was likely to be forced to illicit intercourse? See 1927 L. 727 : 28 Cr. L. J. 584.
12. Whether the girl had lost her chastity before abduction?
13. Whether the version given in Court is consistent with that given to police or to persons where she was first arrested?
14. Whether the girl is preferring a false charge merely to establish her chastity in the eyes of the relations and acquaintances?
15. Whether she had intercourse with the accused willingly?

### III. Assault on Public Servants (S. 353, I. P. C.)

1. Whether the warrant of arrest or attachment or search is legal? See 1934 A. 1016, 1928 M. 624, 51 C. 9, 2, 1924 L. 667 (2) : 25 Cr. L. J. 43.
2. Whether warrant was signed by the presiding officer or Judge? See 1934 M. 206 : 35 Cr. L. J. 782.
2. Whether it was executed within the time fixed by the Judge? See 1924 N. 68 : 25 Cr. L. J. 223 *contra*, 18 Cr. L. J. 360 : 38 I. C. 744.
4. Whether warrant contained the name of the person to be arrested? 51 C. 902.
5. Whether Judge or Magistrate could legally issue warrant?
6. Whether the date on or before which warrant of attachment is to be executed and the date of its return to Court is given in the warrant? See 1934 A. 1016, 35 C. 1076, 37 C. 122, 1933 A. 46 : 55 A. 119.
7. Whether search was made in the presence of respectable residents of the locality?
8. Whether search was made in accordance with Ss. 165, 166, Cr. P. C? 30 I. C. 341.
9. Whether search warrant was legally issued?
10. Whether copies of record of search are sent to the Magistrate? See 1932 P. 66.
11. Whether the public servant was acting *bona fide* and within the legitimate exercise of his public functions? 25 Cr. L. J. 195.
12. Whether there was possibility of the accused being roughly treated and beaten under order of the public servant? 1933 L. 162 : 34 Cr. L. J. 460.
13. Whether there was merely a scuffle?
14. Whether the public servant was exceeding his legitimate powers?
15. Whether the complaint is by proper person or officer as laid down in S. 195, Cr. P. C.
16. Whether the act was done in discharge of his duty as public servant?
17. Whether the act was done by public servant in good faith under colour of his office?
18. Whether any harm was done beyond a push to Police Officer conducting search without warrant. See 1929 A. 903 : 30 Cr. L. J. 1145, 1931 P. 342 : 32 Cr. L. J. 1166.



19. Whether public servant had right to search the house ? *See* 1923 A. 433 (1) : 24 Cr. L. J. 276.

20. Whether the public servant was putting on his official livery ? *See* 18 Cr. L. J. 689.

21. Whether the subordinate officer making the search had authority in writing ? *See* 30 I. C. 141.

22. Whether warrant was legal ? 18 Cr. L. J. 360, 1945 N. 210.

23. Whether the substance of the warrant was notified to accused ?

24. Whether date of warrant had expired ?

25. Whether provisions of S. 165 Cr. P. C. were complied with ?

#### IV. Assault on Woman. (S. 354, I. P. C.)

1. Whether woman had any modesty to be outraged ? *See* 1928 P. 326 : 29 Cr. L. J. 325.

2. Whether accused had intention to outrage her modesty ? 14 Cr. L. J. 149, 1927 C. 505.

3. What is the age of the girl ? (A girl of 5 years or so has no 'modesty') 1933 C. 366 : 35 Cr. L. J. 308, 17 I. C. 794.

4. Whether the alleged assault was on the occasion of some festival where some liberty is allowed ?

5. Whether the woman had previous intimacy with accused ?

6. Whether the woman is only a tool, avenging her husband ? 5 B. 403.

7. Whether there is a mark of injury or resistance ?

8. Whether some clothes of woman or accused are torn ?

9. Whether the woman is of good character ?

10. Whether woman is of low class and particularly belonging to a class having low morality ? 5 B. 403, Lyons' Med Jur. (1935), p. 375.

11. Was there a previous assault ? 134 L. T. 157.

12. Whether woman had encouraged accused in any way ?

13. Whether the version of the woman is corroborated by conduct and surrounding circumstances ? (1894) 1 U. B. R. 229.

14. Whether there was knowledge that the act was likely to outrage the woman's modesty ? 14 Cr. L. J. 149 ; 69 I. C. 149.

#### V. Breach of Peace. (S. 107, Cr. P. C.)

1. Whether there are bad feelings between the two sections ?

2. Whether civil disputes had been going on for some time and 'there was so serious disputes then ? 1934 Pesh. 21 : 35 Cr. L. J. 963.

3. Whether any wrongful act is contemplated which would lead to breach of peace ?

4. How long the proceedings under S. 107, Cr. P. C., are pending ? Was there any dispute during its pendency ?

5. Whether there had been threats by the accused on different occasions ? 9 I. C. 594, 31 C. 350, 1929 N. 328, 1922 P. 209, 37 A 33.

6. Whether the object is lawful ?

7. Whether accused is exercising his *bona fide* right ? 13 Cr. L. J. 170, 7 Cr. L. J. 504, 37 A. 33.

8. Whether accused is doing a rightful act which provokes a breach of peace ? 1932 L. 101, 1934 O. 179. 1934 P. 105, 1927 L. 695, 34 C. 935, 14 B. 25, 7 A. 461, 39 I. C. 480.

9. Whether there is mere existence of ill-will or enmity between the parties ? 1928 L. 243, 1922 C. 97.

10. Whether accused is in lawful possession of the land or house about which there is dispute ?

# VI. Breach of Trust. (Ss. 406—408, 409, I. P. C.)

1. Whether trust was created of the property ?

2. Whether accused was authorized to sell property entrusted ?

3. Whether the money paid to accused was a deposit or loan or trust ? 32 P. R. 1901 Cr. 95 P. R. 1885.

4. Whether accused was allowed to expend money on behalf of the principal ? 42 A. 522.

5. Whether right to property is disputed or claimed by a third person ? 29 C. 362.

6. Whether property is movable property ? 1930 R. 158, 1925 A. 673, 23 C. 372.

7. Whether accused has some claim to property entrusted to him, although it is not sustainable in law ? 28 C. W. N. 831, 29 I. C. 671.

8. Whether there is payment by accused to a proper person ? 1934 S. 22, 1928 L. 382, 1929 S. 119.

9. Whether any period was fixed for payment into the treasury ? 56 I. C. 669.

10. Whether accused enriched himself clandestinely at the expense of his partner ? 1920 M. W. N. 346.

11. Whether there was long delay in bringing complaint for criminal breach of trust. 1935 R. 361.

12. Whether there is delay in remittance ? 1930 M. 507, 1934 C. 532, 41 C. 844, 1925 C. 613.

13. Whether there is failure to account for money ? 1930 P. 203. 31 Cr. L. J. 249.

14. Whether master was in debt to servant when the latter misappropriated some small amount ? 3 I. C. 285, 140 M. 329.

15. Whether there was intention to pay back money ? 39 P. L. 1902, 1930 O. 324, 1927 S. 28.

16. Whether property was obtained by cheating ? 1936 M. 353. See 1936 M. 1. 1923 M. 597.

17. Whether it was security deposited by servant ? 44 C. W. N. 872.

18. Whether property is immovable ? 1932 M. W. N. 1353.

19. Whether there is documentary evidence to prove trust or breach of trust ?

20. Whether there was wrongful loss of gain ? 1936 P. 350 : 15 P. 108, 22 C. 1017, 1929 P. 429, 1930 B. 490, 46 B. 641, 9 R. 338.

#### VII. Bribery Cases. (S. 161, I. P. C.)

1. Whether witness paid the bribe himself or was instrumental in payment or co-operated in payment of bribe ? Such persons are accomplices. 1929 N. 215 : 30 Cr. L. J. 311, 27 C. 144, 26 B. 193, 14 B. 331, 14 B. 115, 114 I. C. 457, 38 I. C. 429.

2. Whether the witness advancing money had knowledge that bribe was to be paid ? Such a witness is an abettor. 1929 N. 215, 1929 B. 296 : 53 B. 479, 27 C. 144, 26 B. 193, 14 B. 331.

3. Whether testimony of bribe-giver is materially corroborated ? 63 P. L. R. 1918, 30 Cr. L. J. 311.

4. Whether money was paid to Police Officer for obtaining release of person wrongfully confined ? It amounts to extortion, 27 C. 925, 1935 B. 230.

5. Whether there is documentary evidence to establish bribery ?

6. Whether bribe was offered or given openly or secretly ?

7. Whether it was within the powers of the public servant to show any favour to the person offering bribe ? 1921 C. 344 : 64 I. C. 369.

8. Whether the public servant was *functus officio* when bribe was offered so reconsider the question ? 1929 M. 756 : 30 Cr. L. J. 1055.

9. Whether public servant possessed power to show favour ? 1921 C. 344 : 64 I. C. 369.

10. Whether money was paid for doing unofficial act ? 1883 A. W. N. 179.

11. Whether money was taken for public object or charity ? 1923 B. 44 : 23 Cr. L. J. 466, 1925 N. 313, 21 B. 517.

12. Whether money was offered to public servant to lay a trap to expose him ? 22 M. L. T. 373.

13. Whether the record or judicial file prepared by public servant shows that some undue favour was shown ?

14. Whether complainant has a motive or grudge against the public servant ?

15. Whether complainant had sufficient means to give the bribe ?

16. Whether the source of money given as bribe can be traced ?

17. Whether it was public servant who actually took the money or some third person took it on his behalf ?

18. Whether the pay, status and character of public servant is such that he would accept a small sum as bribe ?

19. Whether payment was made to pass work ? 1944 S. 183.

20. Whether it was a *bakhshish* ?

#### VIII. Cheating Cases

1. What was the inducement offered by the accused which led to the payment of money ?

2. Was the mis-appropriation fraudulent ?

3. What was the intention of the accused at the time of the offence ?  
1934 P. 31, 52 C. 188.
4. Could the plaintiff find out the exact circumstances under which the inducement was made ?
5. Did the conduct of the accused induce the plaintiff to part with the money ?
6. What was the subsequent conduct of the accused ? 1922 A. 244.
7. Was the dishonest intention on the part of the accused only subsequent to the deed ? 1923 L. 621.
8. Was the mis-representation absolutely false ?
9. Did the accused represent ornaments containing alloy as that of pure gold. 1935 R. 426, 29 A. 141, 18 A. L. J. 371.
10. Was it a case of puffing one's goods or advertising or giving undue praise to one's good ? 1925 C. 605 ; 26 Cr. L. J. 921.
11. Did the accused give false name and address in order to shield himself from prosecution ? (1893) Un-rep. Cr. Case. 635.
12. Did the accused get money to exert influence to restore complainant to his caste ?
13. Was the cheque post-dated ? 1936 C. 324.
14. Did the accused know that the funds in the bank were not sufficient to meet the cheque ? 1930 B. 179.
15. Was an immediate payment contemplated by cheque ? 1928 O. 292.
16. Did the accused have any account with the bank ? 1925 C. 14 : 52 C. 347.
17. In case of sale of immovable property whether the accused omitted to disclose the previous encumbrance on the property ? 27 A. 302, 27 A. 561.
18. In case of concealment of fact whether the accused was legally bound to disclose it ? 27 A. 561, 30 I. C. 994, 1928 P. 337.
19. Was there any damage or harm to body, mind or reputation ? 51 C. 250.
20. Was the approximate and natural result due to the act of the inducement ? 52 C. 188.
21. Did the accused enter an exhibition or show without ticket ? 6 Bom. H. C. R. 6.
22. What is the financial position of the accused ?
23. Was he quite honest in his previous dealings ?
24. Whether it was only doing of something fraudulently or dishonestly ?  
1938 M. 129, 1946 P. 125.
25. Whether it was only going of wrong name and address ? (1893) un-Rep. Cr. C. 635.

#### IX. As to Confession

##### A. To a Magistrate Who Recorded Confession.

1. Was the confession made before the accused was put on trial, viz., during police investigation ? 37 C. 467, 137 I. C. 57 ; 33 P. L. R. 25.

2. Did you (Magistrate) inquire from the accused, as to how long he had been in police custody ? 1931 L. 763, 25 B. 543.
3. Did you examine the person of the accused to find out is he had any marks of violence ?
4. Did you question the accused as to how he was treated by the police ?
5. Did you question the accused as to why he was making confession ?
6. Did you ask the accused if any inducement was offered to him to make the confession ?
7. Did you ask the accused if any threat was held out to him by police or any other official ?
8. Did you give the accused half an hour or so in order to compose himself before recording his statement ? 1935 L. 320 : 35 Cr. L. J. 1180.
9. Was any police officer (e. g., Court Inspector) present at the time of recording confession ? 1924 L. 624, 1922 L. 237.
10. Did you inform the accused that you are a Magistrate ? 1926 C. 742 : 27 Cr. L. J. 621.
11. Did you ask the the accused if he was making the statement voluntarily ? 2 L. 325, 1924 L. 481, 33 P. L. R. 415.
12. What questions did you put to accused to satisfy yourself that he was making the confession voluntarily ? 1926 C. 742.
13. Did you tell the accused that any statement he is going to make can be used against you as a piece of evidence ?
14. Did you take down the confession in a simple narrative or in the form of questions and answers ? 45 A. 166, 14 C. 539, 1 C. 616.
15. Did you make the record in your handwriting ?
16. Did you append the certificate of its being voluntary ?
17. Does the record bear the signature or thumb-impression of accused ? 1934 A. 81 : 56 A. 302.
18. Was the confession recorded in the language in which it was made ? 21 C. 642.
19. Do you know the language in which confession was made ? 5. C. 826.
20. Was the statement read over to accused ? 4 P. L. T. 186.
21. In case of literate accused did you get his signatures ? 32 C. 550.
22. Did you record the confession in Court or at Thana or at your house ? 1930 L. 171, 1932 L. 204, 1933 L. 311 (2) : 34 Cr. L. J. 712.
23. What was the time when you recorded the confession ? (Recording confession at Thana at night is improper). 1932 L. 204 : 136 I. C. 19. See 1933 L. 311 (2).
24. Was the confession recorded in a place in Native State ? 62 I. C. 583.
25. Was the record of confession handed over to the Police Officer ? 1936 L. 341 : 37 Cr. L. J. 504, 1931 L. 408 : 32 Cr. L. J. 818.
26. Was the accused sent to police custody after making the confession or sent to jail ? 1934 O. 19 : 35 Cr. L. J. 664, 1936 L. 278 : 37 Cr. L. J. 493, 1936 L. 357 : 17 L. 419.

27. Does the record of confession bear the certificate or memorandum under S. 364, Cr. P. C.? 1936 P. C. 253 (2),

28. Whether there was any Police Investigation pending? 1935 O. 416=36 Cr. L. J. 927, 32 C. 1085.

29. Whether Magistrate was empowered to record? 87 C. 467.

30. Whether challan had been put in before recording?

*B. In Case of Extra Judicial Confession*

1. What were the exact words used by the accused? 1928 L. 858, 1932 O. 324, 14 P. R. 1911 Cr.

2. Was the confession made jointly by a number of accused persons? 6 L. 437.

3. Whether threat or inducement was made before the confession? 8 P. 289.

4. Was confession obtained by under influence? 10 C. 775, 3 B. 12, 15 B. 452.

5. Was there any threat to put accused's womanfolk to trouble? 22 Cr. L. J. 225.

6. Was there a promise of getting the accused released? 50 C. 127, 8 P. R. 1882, 45 B. 1086.

7. Was the confession made under inducement of being made an approver? 45 A. 300, 45 A. 633.

8. Did the village *Panch* tell the accused that they know the truth and that he had better tell the truth? 1929 P. 275; 8 P. 289.

9. Did the person in authority tell the accused, 'I will try to save you'? 60 C. 719.

10. Did the complainant offer to drop proceedings? 1921 C. 458. Or compromise the matter? 17 Cr. L. J. 188.

11. Is the person to whom confession is made, a *Lambardar*, *Zaildar*, *Prosecutor* or any other person in authority? See Prem's Criminal Practice, heading "Confession by inducement or threat."

**X. Criminal Trespass.** (Ss. 447-448, I. P. C.)

1. Whether complainant was in actual physical possession of the land or house? 33 A. 773, 1929 O. 369: 29 Cr. L. J. 745, 43 I. C. 405, see also 1928 B. 221: 112 I. C. 97, 1925 A. 510.

2. Whether land or house was lying vacant? 1925 A. 540: 47 A. 855, 1924 M. 862: 26 Cr. L. J. 219.

3. Whether accused remained unlawfully on the property after entering lawfully? 2 A. 465, 1928 P. 124: 6 P. 794, 1933 A. 816.

4. Whether accused entered at the invitation of the complainant, when subsequently a quarrel broke out? 1936 N. 176.

5. Whether accused entered the house to have sexual intercourse with an inmate of the house? 4 P. 459: 26 Cr. L. J. 954. If so, whether there was separate apartment for her? 4 P. 459, and whether the woman was of loose character? 12 P. R. 1898 Cr., 50 P. L. R. 1919.

6. Whether accused entered the house to have sexual intercourse with a widow or unmarried girl of over 16 years? 38 A. 517, 17 P. R. 1908 Cr. 28

P. R. 1905 Cr., and whether father of the girl was absent from the house? 1926 L. 600: 96 I. C. 871, and whether accused took all precautions to avoid discovery? 1926 L. 600.

7. Whether there was consent or connivance of the husband in case of trespass to have intercourse with the wife? 1925 C. 160: 25 Cr. L. J. 1816, 19 A. 74.

8. Whether *Dakhal Nama* only gave formal possession to the complainant? 1925 A. 592: 26 Cr. L. J. 1125.

9. Whether entry was in execution of decree by decree-holder? 2 M. 30, 1930 C. 720, 15 A. L. J. 808.

10. Whether there was knowledge on the part of the accused that it was likely to annoy or insult? 1927 S. 159; 28 Cr. L. J. 349, 1935 S. 20; 36 Cr. L. J. 577, 1933 A. 816, 47 A. 855, 41 M. 156, 19 M. 240, 1933 O. 469, 1233 O. 436.

11. Whether accused entered the house in the absence of the owner? 1924 B. 986, 17 A. L. J. 334, 47 A. 855, *but see* 1931 M. 231: 54 M. 515.

12. Whether accused entered with implied permission?

13. Whether accused entered under *bona fide* claim of right? 1925 A. 540; 47 A. 855, 1925 N. 36: 81 I. C. 888, 1925 P. 167: 25 Cr. L. J. 1047, 43 C. 1143.

14. Whether accused was prior lessee? 1. C. L. J. 104.

15. Whether accused claims to have inherited the house? 1 P. R. 1884 Cr., and took possession without force? 11 P. R. 191.

16. Whether accused purchased the property in dispute from an ostensible owner? 1926 M. 349: 27 Cr. L. J. 88.

17. Whether accused is a co-sharer or joint owner? 36 A. 474, 3 M. 118, 1933 S. 396.

18. Whether the entry was with the permission of one of the members of the family? 6 Beng. L. R. 80.

19. Whether landlord entered at the expiration of lease? 2 A. 101, 9 A. 58, 38 I. C. 962, 18 Cr. L. J. 402.

20. Whether the intention was of taking possession of the field in dispute? 1933 O. 179; 145 I. C. 625, 1930 L. 666, 41 M. 156.

21. Whether entry consists in encroachment or building on the land of another? 1933 A. 816: 147 I. C. 119.

22. Whether intention was to make complainant's property one's own? 1935 S. 20: 36 Cr. L. J. 577.

23. Whether accused entered in the absence of owner? 1938 L. 448, 47 A. 855, 1924 B. 486.

24. What was the intention of accused? 1940 P. 14.

25. Whether land is disputed? 1936 R. 116.

#### XI. Dacoity (S. 395, I. P. C.)

1. Whether number of persons concerned in the offence is five or less? 1925 L. 337: 6 L. 24, 1927 L. 519: 39 A. 348, 1925 O. 233: 25 Cr. L. J. 1375, 1928 M. 144: 29 Cr. L. J. 5.

2. Whether some accused out of five were merely encouraging others who were committing raid? 1922 M. 195.

3. Whether any property was carried away ? (1868) 9 W. R. 5.
4. Whether accused acted under a claim of right ? 3 M. H. C. R. 254.
5. Whether night was dark ? 93 I. C. 892 : 27 Cr. L. J. 492, 1925 L. 426, 1935 L. 146.
6. Whether there was sufficient light from fire or lantern to identify the accused ? 1923 O. 39.
7. What part was taken by each dacoit at the time of the offence ? 6 C. W. N. 72, 38 I. C. 730.
8. Whether inmates of the house were terrorized and hence identification difficult ? 1927 C. 820 : 28 Cr. L. J. 874.
9. Whether faces of accused were muffled, at the time of dacoity ?
10. Whether witnesses gave description of the accused, to the Police or villagers ? 1925 L. 426 : 26 Cr. L. J. 693.
11. Whether witness took slight impression of accused ? 1929 A. 928.
12. Whether witness was put in fear of bodily injury or death ? 1927 C. 820, 1933 L. 299, 27 Cr. L. J. 492.
13. Whether accused were mentioned in the F. I. R. ? 93 P. L. R. 1915 : 16 Cr. L. J. 204, 1929 N. 222 : 30 Cr. L. J. 331.
14. Whether witness followed the accused in the dark night and it was there that he identified him ? 1923 L. 167.
15. How long after the arrest of accused, identification was made ? 1924 A. 645 : 26 Cr. L. J. 501, 1925 L. 426, 1935 L. 146.
16. How long after the occurrence the stolen property was recovered from the possession of accused ? (1865) 3 W. R. 10 Cr., (1866) 5 W. R. 66 Cr.
17. Whether approver's testimony is corroborated in material particulars ? 1924 L. 727, 1923 L. 385, 1925 L. 44.
18. Whether articles recovered from accused were common things and incapable of identification ? 1925 L. 44 : 26 Cr. L. J. 412.
19. Whether articles recovered were mentioned in F. I. R. ? 1923 L. 385 : 25 Cr. L. J. 252.
20. Whether accused was put in charge of horse or boat by other dacoits at considerable distance ? 1926 C. 374 : 26 Cr. L. J. 1146.
21. How far is the village of accused ? 1942 A. 47.
22. Whether accused were known to complainant and whether their faces were muffled. 1942 A. 47, 1937 C. 820.
23. Whether stolen property was pointed out before one month or after ? 1937 O. 157.
24. How the criminals were traced ?
25. Whether there was previous friendship or good relations among the dacoits ?
26. Whether there is merely association with the dacoits ? 43 I. C. 111.
27. Whether approver is substituting innocent person for the real offender ? 1931 L. 408 : 32 Cr. L. J. 818.



28. Whether manipulation in the personnel of the actors in the crime is easy ? 1926 O. 120 : 27 Cr. L. J. 529.
29. Whether complainant has motive to implicate a particular accused ? 1926 O. 120 : 27 Cr. L. J. 529, 1931 L. 38.
30. Whether minor part is assigned to the particular accused ? 1935 Pesh. 75, 1935 Pesh. 50.
31. As to identification of accused, *see* separate chapter "As to Identification of Persons."

## XII. Defamation Case (S. 500, I. P. C.)

1. Whether complaint is by proper person, *viz.*, by aggrieved person under S. 198, Cr. P. C. ? *See* Prem's Criminal Practice (Defamation—7).
2. Whether imputation is against an association or collection of persons, or it is against an individual ? 1922 P. 101 : 67 I. C. 609, 1925 C. 1121, 1935 A. 743 : 36 Cr. L. J. 816.
3. What is the character of the complainant ? (General bad character of the complainant can be proved). 4 L. 55 : 1925 L. 225.
4. Whether imputation made is true ? 1928 R. 167 : 30 Cr. L. J. 239, 1933 S. 403.
5. Whether imputation was in the form of report to Police honestly ? 1923 A. 167 : 77 I. C. 913, 41 A. 311.
6. Whether imputation was made in the form of complaint to Magistrate ? (It is privileged, if true). 1934 A. 904.
7. Whether objectional remarks were made to protect oneself rather than to injure others ? 1929 C. 346 : 56 C. 1013, 4 C. 124.
8. In case of defamation by witness, whether his evidence was true and relevant to the case ? 40 A. 271, 14 P. R. 1893, 7 P. W. R. 1911 Cr.
9. Whether complainant had any reputation to lose ? 4 L. 55 : 1923 L. 225.
10. Whether the report containing the defamatory statement was made under superior's order and in execution of his duty ? 1928 A. 316, 23 P. R. 1880.
11. Whether imputation was made for public good ? 11 Cr. L. J. 588.
12. Whether imputation was made in self-defence ? 11 Cr. L. J. 588.
13. Whether the imputation against Municipal Commissioner was not made by attacking his private character ? 1914 M. W. N. 351.
14. Whether defamatory matter was published ? 19 B. 703, 6 M. 381, 1924 M. 340.
15. Whether defamatory matter was only published to the complainant only ? 1935 C. 736, 7 A. 205, 7 C. W. N. 74.
16. Whether defamatory matter was conveyed in a letter or post-card ? 6 M. 381, 1935 C. 736, 1933 A. 210.
17. In case of defamation by *newspaper* :—
  - (a) whether proprietor had employed a competent editor ? 12 P. R. 1883 Cr.

(b) whether newspaper was delivered in the postal area over which the Court had jurisdiction ? 1928 A. 222.

(c) whether editor made some enquiry about the truth of defamatory matter before publishing it ? 1929 S. 90 : 30 Cr. L. J. 548, 1928 A. 321, 1933 A. 434 : 34 Cr. L. J. 926.

(d) whether the editor believed the alleged defamatory article to be true ? 1939 S. 90, 1933 A. 434, 1928 A. 321.

(e) whether editor was absent and libel was published without his knowledge ? 9 M. 387, 12 P. R. 1883.

(f) whether imputation amounted to fair comment ? 15 Cr. L. J. 357 : 23 I. C. 725.

(g) whether complainant is the person aimed at by the defamatory article ? 1928 A. 321 : 30 Cr. L. J. 766.

18. Whether Court has jurisdiction in the matter ? 1924 M. 340, 3 A. 342, 16 A. 389, 22 B. 112, 33 B. 77, 44 P. R. 1885, 1923 M. 66.

19. Whether defamatory words were used in street quarrel and were mere vulgar abuse ? (1887) 1 Weir 607, 1883 A. W. N. 36—167, 45 I. C. 1005.

20. Whether imputation was made to the authorities in good faith ? 17 Bom. L. R. 82, 8 L. B. R. 440, 11 C. W. N. 390.

21. Whether imputation was made in good faith ? 1929 C. 779, 1929 M. W. N. 598, 50 C. 518, 1925 M. 246.

22. What were the exact words used by accused ? 1929 A. 1 : 51 A. 313.

23. Whether it was only the "impression left on the mind of the witnesses" that was offered as proof of imputation ? 51 A. 313.

24. Whether complainant is the person aimed at by the defamatory article ? 1928 A. 321 : 30 Cr. L. J. 766.

25. Whether language employed was offensive ? 1925 C. 1121 : 26 Cr. L. J. 1539.

26. Whether accused had reason to believe the statement to be true, though it is proved to be untrue. 1924 N. 172 : 25 Cr. L. J. 169.

27. Whether statement was made by party to a suit in good faith ? 50 B. 162, 48 C. 388, 1925 R. 360, 1928 A. 316.

28. Whether statement was made by counsel actuated by actual malice ? 6 P. 224, 19 B. 340.

29. Whether statement was made by counsel in good faith under instructions ? 55 C. 85, 111 I. C. 569, 1925 R. 345, 19 B. 340, 1927 M. 379, 1926 P. 499.

30. Whether it was only vulgar abuse ? 1936 L. 294.

### XIII. In Case of Drowning

1. Did you notice any external marks on the body ?

2. Did you notice any unnatural appearance in *post-mortem* examination ?

3. Did you find any foreign matters, weeds, stems, etc., in the hair or clenched in the hands of the deceased ?

4. Did you find any water in stomach, if so, how much ?
5. Do you think that the deceased was intoxicated before drowning ?
6. Is it not possible that the deceased may have been stunned by the fall into the water or his body striking some solid object in its fall ?
7. What was the condition of his heart ?
8. Is it not possible that the deceased found himself in some dangerous position, took fright and died of shock by sudden stoppage of the heart ?
9. Was there any cramp in the muscles of the limbs ?
10. Was the deceased subject to fits of apoplexy or to epileptic fits ?
11. On opening the body did you observe black blood in the pulmonary arteries and veins ?
12. What is the time required in death in drowning ?
13. Is it not a fact that bodies taken out of well often present considerable marks of violence when the deceased persons have fallen in accidentally or have thrown themselves intentionally ?
14. Was there any fracture of bones ?
15. Was the violence on the body inflicted by fishes, millescs, etc. ?
16. Was there any marks of violence on wrists and on the fore part of the neck ?
17. Can you distinguish a case of person who has fallen into the water by accident from that of a person who has thrown himself in or is victim of homicide ?
18. Was the penis contracted ?
19. Were the breast nipples of the woman contracted ?
20. In the case of Hindu woman, was her cloth drawn tightly between the legs and was it fastened firmly at the waist so as to prevent any indecent exposure of the person on discovery of her body ?
21. It is not highly improbable that water can enter the stomach after death ?

#### XIV. Regarding Dying Declaration

1. Could the deceased speak clearly despite serious injuries ? 1933 O. 333.
2. What was the condition of pulse at the time of making the dying declaration ?
3. Were relations of deceased present at the time of recording the dying declaration ?
4. Did they interfere or in any way or prompt the deceased when he made the dying declaration ? 1934 A. 908, 1926 L. 498 : 27 Cr. L. J. 903.
5. Was the deceased well aware of the fact that accused had been named as assailant ? 28 Cr. L. J. 114.

6. Was dying declaration made by signs? 1924 L. 581 : 26 Cr. L. J. 328.
7. Was it recorded in the form of questions and answers? 52 C. 987.
8. Was the dying declaration recorded in the presence of accused? If so, was he allowed to cross-examine the deponent? 6 C. W. N. 72, 52 C. 987.
9. Did the declarant survive afterwards? 4 Bom. L. R. 434, 21 Cr. L. J. 183.
10. Was the statement made before receiving injuries, and if so, how long before it? 4 L. 451, see 1935 L. 94, 50 B. 683.
11. Does the statement make reference to motive of accused? 54 M. 931, 4 L. 451.
12. Does the dying declaration relate to the injuries sustained by some one else? 17 P. R. 1901 Cr., 4 C. 451, 1931 M. 233, 1930 O. 247.
13. Was the dying declaration signed by the deponent? 15 Cr. L. J. 143.
14. Does the dying declaration contradict itself? 29 Cr. L. J. 418.
15. Was the Magistrate competent to record the dying declaration? 1930 L. 60, 1932 L. 14 : 32 Cr. L. J. 1118.
16. Was the dying declaration made by any of the accused? 1935 O. 477.
17. Was the dying declaration tutored or 'touched up'? 1934 L. 805.
18. How long after the first information report, the dying declaration was recorded?
19. Did the police record dying declaration before getting it recorded by Magistrate?
20. How long the relatives of the deceased were with him, before his dying declaration was recorded?
21. Is the version given in the dying declaration, on the face of it, improbable?
22. How long after the dying declaration did the deponent die?
23. Did the doctor certify that the deponent was in a fit state to make the dying declaration?

#### XV. Enticing away Married Woman (S, 498, I. P. C.)

1. Whether complaint to Magistrate is by husband or some one having care of the woman? 1935 P. 357 : 36 Cr. L. J. 856, 32 P. R. 1910 Cr., 1926 S. 159.
2. Whether complaint was made to Police and not to Magistrate? 1923 M. 59, 30 C. 910, 13 Cr. L. J. 287.
3. Whether marriage of complainant with the woman is strictly proved? 100 I. C. 236 : 28 Cr. L. J. 268, 5 C. 566, 55 I. C. 736, 20 A. 166, 5 P. R. 1894 Cr. See Prem's Criminal Practice (Enticing or detaining married woman—19).

4. Whether marriage between complainant and his wife was lawful? 1924 L. 243, 17 P. R. 1893 Cr., 83 P. L. R. 1912, 1933 C. 880.

5. Whether the woman remained in accused's house willingly for immoral purpose? 1934 O. 258; 35 Cr. L. J. 932.

6. Whether woman was under the control of the husband? 1934 S. 10, 1927 O. 318.

7. Was the woman was living with the accused of her own free will? 56 I. C. 209; 21 Cr. L. J. 383.

8. Whether detention of woman was with any criminal intent? 319 P. L. R. 1913; 14 Cr. L. J. 595.

9. Whether woman had been discarded by the husband? 129 P. L. R. 1915; 16 Cr. L. J. 216, 1 C. W. N. 498, 15 P. R. 1883 Cr.

10. Whether woman had been divorced by her husband? 27 P. R. 1879 Cr., 1 P. R. 1875 Cr.

11. Whether wife had left her husband's protection before her seduction? 27 I. C. 840, 15 P. R. 1883.

12. Whether Court has jurisdiction, i.e., detention or concealment was in the District? 51 P. L. R. 1918, 3 A. 251.

13. Whether accused had knowledge that woman was the wife of the complainant? 1931 L. 194; 32 Cr. L. J. 1210, 1933 C. 820, 1928 L. 898.

14. Whether accused and the woman belong to the same village or different villages?

15. Whether accused belongs to complainant's brotherhood?

16. Whether woman is of loose character?

17. Whether witness of abduction met the accused and the woman at different times and places and were mere *vajtakars*? 100 P. L. R. 1916.

18. As regards marriage:—(a) Whether it was recorded in marriage register? (b) Whether any agreement in writing was made at that time? (c) Who was the *Qazi* or *Prohit*? (d) Who were the witnesses of the marriage? (e) Was any dower fixed? (f) Who gave the consent if girl was minor? (g) What ceremonies were performed? (h) Whether marriage was during the period of *iddat*? (i) Whether the Muhammadan complainant had already four wives? (j) Whether parties could legally contract the marriage?

#### XVI. In Case of False Evidence under S. 193, I. P. C.

1. Was the statement alleged to be false, read over and admitted to be correct? 1928 L. 125, 42 M. 56, 28 M. 308.

2. Was the statement read over at the end of the deposition or it was being read out sentence by sentence as it was being recorded? 63 I. C. 461, 22 Cr. L. J. 609, 62 I. C. 581.

3. Does the statement bear the certificate of R. O. A. C.? 1925 P. 723; 26 Cr. L. J. 227, 1927 P. 100, 125 C. 940.

4. Whether the statement was read over by clerk of the Court and in the absence of the Judge? 28 L. 326, but see 34 M. 144.

5. Whether the Magistrate was taking evidence of some other witness when the statement was read over to the witness? 52 C. 499, 1926 C. 423, 1925 C. 933.

6. Was the statement read over in the presence of the accused? 51 C. 236, 52 C. 159, 1925 C. 528.

7. Did the accused retract his false statement in the witness-box and reverted to truth in the course of trial? 112 I. C. 468, 29 Cr. L. J. 1044, 1925 L. 646.

8. Did the witness immediately correct himself in the same deposition? 1924 A. 84, 1924 O. 373, 1926 P. 517, 27 Cr. L. J. 953.

9. Did the Court before whom the alleged statement was made, have jurisdiction? 6 A. 103, 11 B. 702, 20 Cr. L. J. 245, 20 C. 719.

10. Whether the alleged false statement is mere oath against oath? 1927 L. 996 : 28 Cr. L. J. 1007.

11. Whether the Court had authority to administer oath to the witness? 20 C. 714, 14 C. 653, 24 C. 755, 11 B. 702.

12. Whether the alleged false statement was material to the case? 1929 A. 936, 30 Cr. L. J. 1154, 2 Pat. L. T. 380.

13. Whether the accused made the false statement intentionally? 1934 O. 65, 26 A. 509.

14. Whether the alleged statement was made due to cowardice? 1934 S. 6 : 35 Cr. L. J. 736.

15. Whether the statement is merely incorrect? 43 I. C. 822, 71 I. C. 761.

16. Whether the alleged statement is merely ambiguous? 1924 P. 381, 24 Cr. L. J. 471.

17. Whether the alleged statement is dubious or uncertain? 17 Cr. L. J. 96.

18. Whether the alleged statement amounted to merely hearsay evidence? 11 Cr. L. J. 351.

19. Is the statement false to the knowledge of the accused? 61 I. C. 521 : 22 Cr. L. J. 393.

20. Is it impossible that the statement made on oath was not true? 1924 R. 17, 25 Cr. L. J. 185, 1924 P. 276.

21. Is the statement merely contradictory to some other statement made by the accused? 1929 C. 353, 55 C. 312, 18 B. 377.

22. Was the complaint under S. 195 (b), Cr. P. C., made by competent person or authority? 1925 M. 1157 : 90 I. C. 661.

23. Does the complaint contain alleged false statement? 1925 M. 609, 48 M. 395, 39 A. 367.

24. Is the statement capable of reasonable explanation? 124 P. 381 : 24 Cr. L. J. 471.

25. Is the prosecution based on the fact that the statement is against the opinion of the handwriting expert? 1924 R. 17 : 25 Cr. L. J. 185.

26. Is the prosecution based on the fact that the alleged statement is against the medical evidence? 1927 M. 996, 50 C. 100, 1924 B. 457.

## XVII. In Case of Fire of Arson. (Ss. 435-436 I. P. C.)

1. Was the accused merely a spectator ?
2. Whether accused had any intention to cause danger to the property ?
3. Whether accused was merely negligent in setting fire to his rubbish and that the fire spread by wind ? 4 Cr. L. J. 146 : 8 Bom. L. R. 851.
4. What is the value of property damaged ?
5. Whether property was a "building ?"
6. What was the intention of the accused in setting fire ? (1865) 3 W. R. 18 Cr.
7. Whether the eye-witnesses named the accused immediately ?
8. What was the conduct of eye-witnesses after they saw the accused ?
9. Did the eye-witness chase the accused ?
10. What was the distance between the witnesses and the accused at the time of offence ?
11. Was the night dark ?
12. What was the dress worn by accused at the time of the offence ?
13. If the accused was arrested at the spot, was any combustible substance recovered from him ?
14. Was any match-box recovered from the accused ?
15. Whether the witness was alone at the time ?
16. Who observed the fire first, and what did that person observe ?
17. Where was the fire first observed, or where did it originate ? In which building and in which room ?
18. How was this room furnished ? Was there a fireplace or stove of any kind ?
19. Who was in the room when the fire was observed, or who was the last to visit the room ? For what purpose did this person visit the room ?
20. Did the visitor use fire or light in some form ? Did he smoke ?
21. Did the children use matches, and where were the matches kept ?
22. Was there a fire in the fireplace or stove ? When was it lit and fuel was used ?
23. Were inflammable objects lying on or hanging near the stove or fireplace ?
24. Were the stove, or the fireplace and flue well insulated, and were all clean-out doors and other openings in the flue well carefully closed ?
25. Was there soot in the flue, and when was it cleaned the last time ?
26. When were the ashes last removed ? In what container were they kept, and where was this placed ?
27. In what manner were lamps, candles or lanterns placed in the room ? Distance from ceiling, window or inflammable material ?
28. Were there electric wires for light and power ? When were they installed or repaired ? Who did this work and when was the last time it was tested ? How many watts ?
29. Was heat in the electrical contacts observed at any time ?

30. If there was an electric motor in the room, how was this safeguarded against dust ?

31. Was the electric current on or off at the time of the fire ?

32. Were there machines in the room ? What machines ? What power was used ? When were they used last ? When were they last tested and lubricated ?

33. Had there been any fire, or attempt to set fire, before at the place ?

34. Were there substances which might be subject to spontaneous combustion ? What were they ? How were they stored ?

35. How, when and for what amount were the building and other property insured ?

36. What is the relation between the amount of the insurance and the actual value of the property ?

37. Was there other insurance than fire insurance, as, for instance. Use and Occupancy Insurance ? For what amount ?

38. Were there fire extinguishing devices installed in the premises ? What were they ? How did they function ?

39. Had anyone a personal interest in the fire ? Who ? In what manner ?

40. Was some business conducted in the building ? Were account books kept ? Where they saved, or what was done to save them ?

[The author is indebted for the last 25 questions to Harry Soderman, D. Sc. of Stockholm University, Sweden and John J O'Connell, Dean of Police Academy, New York authors of "Modern Criminal Investigation," and the Publishers Funk and Wagnalls Company, New York and London.]

### XVIII. As to First Information Report

1. Was there any delay in F. I. R. ? 1924 A. 441, 25 Cr. L. J. 93, 1924 C. 975 : 51 C. 924, 27 Cr. L. J. 225, 42 C. 784.

2. Was the accused's name mentioned in the F. I. R. ? 93 I. C. 892 : 27 Cr. L. J. 492.

3. Were the names of the witnesses mentioned in the F. I. R. ? 1922 L. 28, 1933 L. 1035, 1928 L. 57, 1938 L. 507.

4. Was the F. I. R. given by one who was an eye-witness ? 1926 L. 399 : 27 Cr. L. J. 544, 1933 L. 1052.

5. Was the accused's name omitted in the F. I. R. although it was known to the maker ? 1927 L. 149, 1929 N. 222, 1931 S. 13, 1922 P. 712, 1921 L. 28 1938 L. 880.

6. Whether the F. I. R. was given to the officer in charge of the Police Station ? 1928 C. 771, 42 M. 446, 1933 P. 547.

7. Whether the information was given to the Deputy Superintendent of Police ? 1923 M. 394.

8. Whether the first information report was given at two different places ? 58 C. 1312 ; 1931 C. 745, 2 P. 517, 1936 P. 11 : 36 Cr. L. J. 235.

9. Was there any discrepancy between the F. I. R. and subsequent evidence ? 1931 L. 157, 1931 Q. 148, 1935 L. 146, 1931 L. 38, 1923 L. 685, 1922 L. 410.



10. Was the information given to the Police by telegram ? 1928 M. 791, 1930 L. 457, 1931 S. 13, 1935 C. 403, 1934 L. 413.

11. Was the F. I. R. given by telephone message ? 1931 S. 13.

12. Whether the witnesses named in the F. I. R. are produced by the prosecution ? 132 C. 118 : 58 C. 1135, 1934 C. 458. If not, what is the reason ?

13. Was the writer of the F. I. R. produced ? 1935 C. 458, 1920 C. 988. If not, what is the reason ?

14. Was the informant of F. I. R. examined as witness. 1920 C. 988, 1934 S. 100. If not, what is the reason ?

15. How far is Police Station from the scene of occurrence ?

16. Was the F. I. R. given by an eye-witness ?

17. Was the report given by the person who was not an eye-witness, nor heard the account from an eye-witness ? 6 L. 437 : 1925 L. 18, 318 P. L. R. 1913.

18. Was the F. I. R. made after commencement of investigation ? 1928 P. 634, 1923 P. 550.

19. Was the list of stolen property given to police during investigation by police ? 1925 C. 959.

20. Was the F. I. R. given by accused or one of his party ? 1921 C. 111, 41 C. 601, 49 C 167, 1935 B. 26, 1924 A. 207.

21. Whether accused's name was mentioned in the F. I. R. in a riot case ? 17 Cr. L. J. 450.

22. Whether accused's name was mentioned as a suspect ? 27 Cr. L. J 492.

23. Who accompanied the person giving F. I. R., to the Police Station ?

24. Whether the companions of the informant gave their version to the Police before F. I. R. was recorded ?

25. How long F. I. R. remained with the Police ?

26. When was it sent to the office of the S. P. ?

27. When was copy of F. I. R. sent to the Magistrate ?

28. Was the F. I. R. given at a late stage and after due deliberation ? 95 I. C. 597, 92 I. C. 209.

29. Does the F. I. R. falsify subsequent complaint ? 29 P. W. R. 1911 Cr.

30. Does the F. I. R. contain details of the occurrence ?

#### XIX. In Case of Forgery. (Ss. 465—471, I. P. C )

1. Is the document in question false, or genuine ? 1926 M. 1072, 27 Cr. L. J. 994.

2. Was any persons injured by the forgery ? 1930 P. 271 : 31 Cr. L. J. 1126.

3. Was the document executed on the date which it bears ? 1928 R. 117, 29 Cr. L. J. 599.

4. Whether it was the intention of the accused to secure something to which he is legally entitled in pursuance of the forgery ? 16 Cr. L. J. 246, *contra* 16 P. R. 1885.

5. Was the alteration in a document made to remove the evidence of one's criminal misappropriation ? 36 C. 955.

6. Was the forgery made to save the skin of oneself ? 1935 R. 203 : 156 I. C. 888, 56 B. 488 : 1932 B 545.

7. Was the unauthorised signature made without any intention of causing injury ? 16 Cr. L. J. 76 : 26 I. C. 668.

8. Did the accused use only a blank signed paper, when he had some sort of authority ? 1932 M. W. N. 117, 1932 P. 339, 31 Cr. L. J. 81.

9. Did the accused use the forged document as genuine fraudulently ? 52 C. 881, 51 C. 469.

10. Was the forged document produced by the party or witness himself or it was produced under the orders of the Court ? 52 C. 881, 1926 C. 89, 36 M. 387, 36 M. 393, 1935 A. 940.

11. Whether the accused is found in possession of some other forged documents ? 11 Bom. H. C. R. 90.

12. For further questions. *see* Handwriting Expert.

## XX. In Case of Kidnapping, under S. 363 I. P. C.

1. What is the age of the girl, whether she is over 16 years ? (Prosecution must prove that the girl is under 16 years). 1931 L. 19, 22 I. C. 590.

2. Did the accused plead that the girl was over 16 years ? (It is no defence). 1929 A. 82, 1929 P. 651.

3. Was the girl in charge of any person ? 36 M. 453.

4. Was the girl seduced with the connivance of the mother ? 14 C. L. J. 109.

5. Was the girl a consenting party and was active abettor in the abduction ? 23 I. C. 473, 37 A. 624.

6. Did the girl voluntarily leave her guardian's house and meet the accused on the way ? 23 I. C. 473, 37 A. 624, 2 A. 694, *but see* 40 A. 507.

7. Was the girl betrothed to the accused ? 4 W. R. 7.

8. Was the kidnapping or abduction committed from the lawful guardian ? 1932 A. 776 : 34 Cr. L. J. 100.

9. Did the girl leave the protection of the guardian or parents voluntarily and stayed with the accused of her own accord ? 37 A. 624, 1923 L. 330 : 24 Cr. L. J. 564.

10. Was the girl driven-out from the house by the father ? 16 I. C. 166 : 13 Cr. L. J. 598.

11. Was the girl living with her lawful guardian ? 3 L. 1013, 24 M. 1084.

12. Whether the accused took the girl from an abductor ? 51 A. 188 : 1929 A. 585; 1928 P. 15) (Kidnapping is not a continuing offence) 1926 P. 493, 27 C. 1041, 26 M. 451.

13. Is the girl a mere wait, or stray ? 49 I. C. 48.

14. Was the girl removed with the consent of the guardian ? 36 M. 453.

15. Whether the girl is orphan ? 2 N. W. P. H. C. R. 286.

## XXI. Greivous Hurt (Ss. 425-326, I. P. C.)

1. Did you consider that the injuries inflicted have been caused by the weapon present in the Court ?
2. Could this would be caused by some other weapon ?
3. Can it be caused by fall on any sharp-edged thing ?
4. Is it possible for such wound to have been inflicted by any one on his own person ?
5. Could this incised wound be caused by blunt weapon, especially when the blow was on the part of the body where the skin is stretched tightly over the bone, e.g., skull or elbow or pubic region ? See Taylor's Med. Jur. and Prem's Criminal Practice.
6. What was the direction of the wound ?
7. Can you form an opinion as to the position of the person inflicting such wound with respect to the injured person ?
8. Did the incised wound end on the same side as the hand employed ? (See Prem's Criminal Practice—Wound 37-C).
9. Did the wound tail off at one end into the superficial scratch and was in the accessible position on the left side in case of right-handed man and thus the wounds were self-inflicted ? See Lyon's Jur., 1935 Ed., p. 238.
10. Is their correspondence in situation between cuts on the clothes and wounds on the body ? If not, then were they not self-inflicted ? Lyon's Jur., 1904 Ed., p. 160.
11. Was the weapon found tightly clasped in the hand of the dead body ?
12. Was there any blood stains on the back of the hand, thumb and first finger ? Lyon's Med. Jur., 1935 Ed., p. 232.
13. Were the wounds of slight nature and were inflicted on those regions of the body which are not considered vital ? See Lyon's Jur., 1935 Ed., p. 238.
14. Are not the wounds inflicted with his own hands ? Are they not such so to support false charge ?
15. Was the injured person suffering from diseased spleen ? 2 A. 766, 3 A. 776.
16. How long was the injured person in hospital ?
17. Whether bone was only cut and not fractured.

## XXII. In Case of Gun-firing ?

1. What was the direction of the wound ?
2. Did the position of the wound show that the gun did not discharge close to the body or at some distance from it ?
3. What was the colour of the wound ?
4. Did you find any slug bullet, wads, etc. in the wound ?
5. What was the distance of the firearm discharged ?
6. Was not the gun-shot wound self-inflicted being on a non-vital part ? Taylor's Med. Jur., 1928 Ed., p. 544.

7. Was the wound on the temple of the same side as the hand used in shooting? Lyon's Jur., 1935 Ed., p. 234.
8. What was the direction of the firearm discharged?
9. Were the wounds straight or slanting?
10. What was the position of the assailant at the time the weapon was discharged?
11. Was the firearm discharged accidentally? Lyon's Jur., 1935 Ed., p. 234.
12. What was the number of the shots used?
13. Were there any marks on the dress, if so, what was their sizes?
14. Did you examine the gun?
15. When was the firearm discharged?
16. When was the gun-shot wound inflicted?
17. Was there any swelling, sloughing or supuration?
18. Was the wound dangerous to life?
19. Whether the wound was due to accident, suicide or homicide?
20. How long could the victim survive after the wound?
21. Could he walk after the infliction of wound? Could he talk after the infliction? If so, for how long?
22. What is the distance beyond which the missile fired from a particular firearm ceased to be dangerous?
23. What is the range of the particular gun present in Court?
24. Is it possible that one bullet could cause more than one wounds? See Taylor's Jur. 1928 Ed., p. 1.
25. Is it possible that shots could be fired from the pistol or revolver? See Prem's Criminal Practice (Wound).

### XXIII. Regarding Identification.

1. What was the distance of the person identified? See Prem's Criminal Practice.
2. Whether witness had sufficient opportunity to see the features, of the accused?
3. Whether there was sufficient light? 1934 C. 744, 1929 A. 928.
4. What was the position of light, whether in front or back of the accused?
5. Whether the witness is far-sighted, short-sighted or of weak sight?
6. Whether the witness knew the accused before? 1929 A. 928.  
If so, whether he gave either his name to the Police before the identification? See 1929 P. 517:31 Cr. L. J. 421, 11 Cr. L. J. 623:8 L. C. 317.
7. Whether witness saw the accused after the crime and before identification? 1936 A. 373.
8. Whether witness had full opportunity to see the accused or whether his mind was rivetted to some other details of the occurrence? 1929 A. 928:31 Cr. L. J. 206.
9. In dacoity or robbery cases, whether witness was put in fear of death or bodily injury and whether witness was terrified at the time of occurrence? 1927 C. 820, 1933 L. 299, 27 Cr. L. J. 49.

10. Whether witness had some opportunity to see the accused just before identification parade in Police Station or Court or jail? 1935 L. 230.

11. Whether accused had some distinguishing mark, *e.g.*, scar on the face or any other peculiarity by which he could be easily identified? 1925 L. 19 : 5 L. 396 : 27 Cr. L. J. 170, 1935 A. 592.

12. In identification parade, how many outsiders were mixed up with the accused?

[*Note.* The minimum desirable proportion is of five outsiders to one accused. 1935 A. 652, Ten outsiders, 1936 A. 373.]

13. Whether the outsiders mixed in the identification parade were of the same age or of different ages and nationalities? 34 Cr. L. J. 714 : 1933 L. 308, 29 Cr. L. J. 129 : 106 I. C. 721.

14. Whether accused changed places in the identification parade, after each witness came to identify? 9 Mys. L. J. 385, 29 Cr. L. J. 129 : 106 I. C. 721.

15. Whether accused changed clothes in the identification parade, after each witness came to identify? 29 Cr. L. J. 129 : 106 I. C. 721.

16. Whether there were some policemen in plain clothes in the identification parade? 1936 L. 409 : 162 I. C. 969.

17. Whether witness took slight impression of the accused at the time of occurrence? 1929 A. 928.

18. Whether the attention of the witness was particularly drawn to a specified object or person? 1929 A. 928 : 31 Cr. L. J. 206.

19. Whether faces of the accused were muffled at the time of occurrence?

20. Whether witness identified the accused by voice, gait, or any other peculiarity? 1928 L. 925 : 29 Cr. L. J. 758.

21. How long after the arrest of the accused, the identification parade was held? 1924 A. 645 : 26 Cr. L. J. 501.

22. Whether there was delay in identification parade. 1928 P. 59 : 28 Cr. L. J. 865, 1924 A. 645 : 1935 L. 146.

23. Whether there were mistakes in identifying the accused? 1932 O. 287 : 141 I. C. 511, 1936 A. 373.

24. Whether occurrence was on dark night? 93 I. C. 892 : 27 Cr. L. J. 492, 1930 O. 60 : 31 Cr. L. J. 689, 1925 L. 426 : 26 Cr. L. J. 693, 1925 L. 146.

25. How long after the occurrence, witness identified the accused? [If the night is dark it is difficult to identify accused after 2 or 3 months. 1925 L. 426, 1935 L. 146.] 1928 C. 430 : 29 Cr. L. J. 1009.

26. Whether witness attended the first, second or third parade? 1934 L. 601.

27. Whether witness gave description of the accused previous to identification. 1925 L. 426 : 26 Cr. L. J. 693.

28. Whether witness can identify accused in Court, although he did so in jail? 1927 O. 369 : 29 Cr. L. J. 129, 7 L. 91, 1925 A. 223, 1930 O. 455, 1927 O. 598, 1921 A. 215, 1925 L. 137.

29. Whether witness is illiterate villager or educated? [Illiterate villager is more observant than an educated person.] 1928 O. 430 : 29 Cr. L. J. 1009, 1930 O. 455.

30. Whether witness only identified in Court and not in jail ? 1923 L. 662, 1923 L. 661, 1936 Pesh. 166.

31. Whether witness only identified in jail and not in Court ? 1930 A. 746 : 32 Cr. L. J. 152.

32. Whether any police constable was present in the room where identification was held ? 1934 L. 692.

33. Whether it was moonlit night ? 1932 O. 99 : 33 Cr. L. J. 381, 1936 R. 60.

34. Whether accused objected the time of identification parade that the identifying witness knew him before ? 1935 O. 226 : 35 Cr. L. J. 889, 148 I. C. 1192, 1935 L. 230 : 35 Cr. L. J. 1180.

35. Whether due precautions were taken at the identification parade ? 1922 L. 31 : 23 Cr. L. J. 449.

36. Whether identifying witness made any statement at the time of identification parade ? 1927 A. 163, 1934 L. 641, 1925 L. 19, 1921 A. 215, 1925 L. 137.

37. Whether identifying marks were told by police to the witnesses ? 1928 L. 724 : 29 Cr. L. J. 697.

38. Whether accused was shown to witness before identification parade ? 1935 L. 230, 35 Cr. L. J. 1180.

39. Whether at the parade more "wrong persons" were picked out ? 1933 O. 49 : 34 Cr. L. J. 832, 1934 A. 477.

40. Whether first group of identifying witnesses had talk with the second group of witnesses who identified the accused at the second identification parade ?

41. How long before the identification parade were you called to identify ?

42. Did you identify inside the Police Station ?

43. When was the accused arrested ?

44. Was he remanded to custody after the arrest ?

45. How long was the accused with the Police after the arrest and before identification ?

46. Were you called to the Police Station for identification parade ?

47. Did you go inside the Police Station to inquire when the identification parade will be held ?

(It must be ascertained from the Police Officer that the accused was then in the lock-up).

48. Did you pass by the lock-up ?

49. How long did you stay in the Police Station ?

50. After how long the identification parade was held ?

51. Whether faces were muffled ?

#### XXIV. In Case of Insanity—(to Doctor)

1. How long did you keep the accused under medical observation ?

2. Did you examine the accused on this occasion or on some other occasion as well ?

3. How long had he suffered from mental trouble then ?

4. Do you think he understands the obligation of oath ?

5. Do you think he can give evidence in a Court of law ?
6. Does he appear to have had any previous attack of insanity ?
7. Is he subject to insane delusions ?
8. Do you think he is able to plead to the offence of which he now stands accused ? Give reasons.
9. What is the general character of the delusions ?
10. Is he harmless or dangerous ?
11. What are the causes of his insanity ?
12. Is the insanity congenital or accidental ?
13. Do you think that his insanity is of hereditary origin ?
14. If in your opinion, the accused is feigning insanity, what are the grounds for your belief ?
15. Does he now display any sign of homicidal or suicidal mania ?
16. Can he manage his dress ?
17. Do you know the difference between the medical and legal insanity ? 1923 L. 508.
18. Does the accused say that he is insane ?
19. Is his sleep disturbed or sound ?
20. Is there any intelligent understanding of the conversation affecting him ?
21. What are his eccentricities and unusual habits ?
22. Can he write connected sentences ?
23. Did you acquaint yourself with the personal history of the accused ?
24. Was he ever eccentric, melancholiac, degenerate, neurasthenic ?
25. Is he dangerous or harmful to his friends and relations ?
27. Does he try to escape from Jail ?

#### XXV. In Case of Insanity—(to a Layman)

1. Did the accused try to run away after the commission of the crime ?
2. Did the accused show any remorse after the crime ?
3. Was the accused moody and irritable before the crime ?
4. Did the accused enjoy good bodily health ?
5. Was he eccentric in his manners ?
6. Did the accused keep on wearing the blood-stained clothes till the arrival of the Police ? 1932 L. 260.
7. Was there any motive for the crime ?
8. Did he try to cause injury to his friends and relatives ?
9. Was he subject to delusions ? 1929 C. 1. 28 C. 613, 23 C. 604.
10. Did he try to destroy the evidence of his crime ?
11. Was any government official or Police Officer present at the time of occurrence ?
12. Was he labouring under the such a defect of reason from disease of the mind that he did not know the nature and quality of the act he was doing ? 1932 A. 233.

13. Whether he was in such a state of mind that he would have committed the act even if the policeman had been at his elbow ? 1928 C. 238, 114 I. C. 159.

14. When did he have any lucid intervals ?

15. Did he assault some strangers ? 1935 O. 143.

16. Did the accused attack his children and other relations ? 1933 N. 307.

17. Was the accused suffering from hallucinations ?

18. Was the accused suffering from melancholiac or homicidal mania ?

19. Was his unsoundness of mind such as to impair cognitive faculties of the accused ? 30 P. R. 1878.

20. Could he distinguish right from wrong. 9 Mys. L. J. 28.

21. Did he have good sleep or a disturbed one ?

22. Did he admit his insanity ?

23. Can he write connected sentences ?

24. Did he acknowledge the crime to the Police and the public ?

25. Did he attempt to conceal the traces of his crime ?

26. Does he talk about evil spirits ?

27. Whether he knew the nature and consequences of the act. 14 Cox. C. C. 563.

#### XXVI. In Case of Maintenance. under S. 488, Cr. P. C.

1. Is the complainant legally married wife of the accused ? 1934 M. 323.

2. When was the marriage held ? 1932-C. 866.

3. Whether husband has neglected or refused to maintain her ? 1930 L. 886, 26 Cr. L. J. 128.

4. Does the husband offer to maintain her as wife ? 1930 L. 645.

5. Does the wife refuse to go back to her husband without good reasons ? 1930 L. 665.

6. Does the husband ill-treat his wife ? 46 A. 877.

7. Is the wife guilty of adultery ? 1926 O. 604.

8. Is the husband guilty of adultery ? 20 M. 470.

9. What is the annual income of the husband ? 1926 M. 346.

10. What are the necessities of the wife, e.g., food, clothing, and lodging ? 1933 M. 688 (1) : 56 M. 913.

11. Was there any compromise between husband and wife regarding maintenance ? 1926 L. 469, 1930 L. 524.

12. Whether the parties had consented to live separately ? 1932 L. 349 : 43 Cr. L. J. 488.

13. Is there a decree for restitution of conjugal rights ? 1931 R. 111, 1934 R. 39 : 35 Cr. L. J. 813.

14. Does the wife decline to go to her husband's house ? 30 Cr. L. J. 801.

15. Is the application against the husband or against husband's father ? 1931 L. 532 : 32 Cr. L. J. 1175.



16. Does the husband or the father of child live within the jurisdiction of the Magistrate? 54 B. 548, 1927 A. 291 : 49 A. 479, 1932 N. 85 (2), 24 C. 638

17. Was the wife deserted by the husband? 1932 L. 301.

18. Does the wife refused to go back merely because there is a co-wife? 14 P. R. 1901 Cr., 1927 L. 168, 1926 L. 353 : 27 Cr. L. J. 507.

19. Does the wife refuse to go back because the husband has married again? 25 Cr. L. J. 453, 7 M. 187, 12 P. R. 1914 Cr.

20. Has the husband changed his religion? 1926 S. 278 : 27 Cr. L. J. 1177.

21. Whether the child can maintain himself? 1933 L. 1026.

### XXVII. In Case of Murder

1. Is the name of the accused mentioned in the First Information Report? 1927 L. 151, 1930 B. 294, 1922 L. 28, 1928 P. 359, but see 1928 L. 780.

2. Was there any delay in First Information Report? 1929 C. 975; 51 C. 924, 92 I. C. 209, 1926 L. 496. (See Prem's Criminal Practice—First Information Report—16).

3. Whether the names of the prosecution witness were mentioned in the First Information Report? 1933 L. 1005, 1929 L. 757, 29 Cr. L. J. 378, 1928 L. 507, 1926 L. 369.

4. Is the story told by the prosecution witnesses different from that given in the First Information Report? 1931 L. 157, 1923 L. 385, 1922 L. 41b.

5. Was there any motive for murder? 1927 L. 74, 1932 L. 195, 7 L. 184, 1932 L. 394.

6. Are the witnesses untruthful as to the greater part of their evidence? 1930 O. 460 : 32 Cr. L. J. 94.

7. Has the witness improved upon his former statement? 212 P. L. R. 1915, 1934 N. 204.

8. Was the material witness not produced? 1929 P. 275 : 8 P. 279.

9. Did the witness give information or disclose the crime without delay? 1934 C. 678, 20 M. 1.

10. Is the witness interested? 92 I. C. 175 : 27 Cr. L. J. 223, 1922 L. 76.

11. Is there padding of evidence by the prosecution? 1936 L. 330 : 37 Cr. L. J. 562.

12. How long before the death, the deceased made the dying declaration? 1933 N. 136, 4 L. 451.

13. Were the accused and the deceased last seen together? 1932 L. 43, 1922 L. 171.

14. Whether the common intention of the unlawful assembly was to cause grievous hurts only? 60 I. C. 679 : 22 Cr. L. J. 279.

15. With what weapons were different accused armed? 1935 O. 52, 36 Cr. L. J. 268.

16. Was the fatal blow given by one of the accused and without premeditation? 12 L. 442.

17. Was the body of the deceased satisfactorily identified? 1924 L. 168, 1923 L. 40, 15 P. W. R. 1915 (Cr.).

18. Is the prosecution evidence inconsistent with the medical evidence? 1924 L. 561, 25 Cr. L. J. 573.

19. Did the deceased name the accused as one of the assailants after the attack? 1933 R. 95 : 34 Cr. L. J. 747.

20. Whether the circumstantial evidence is capable of some construction in favour of the accused? 54 M. 931.

21. Was the body of the deceased not found? 1935 L. 806.

22. Whether the blood-stains were found on the clothes of the accused? 1929 S. 179, 1926 B. 513 : 27 Cr. L. J. 1140.

23. Whether the blood-stains were on the clothes of a Zemindar? 131 P. L. R. 113, 67 P. L. R. 1913, 1925 L. 526, 1936 L. 335.

24. Whether the accused died of shock from simple injury? 1929 L. 456 : 30 Cr. L. J. 368.

25. Whether the death of person was caused believing him to be dead? 42 L. 547, 1923 A. 545.

26. Whether the blow was given in drunken brawl? 1934 L. 477.

27. Whether the accused admitted his guilt to the villagers? 117 I. C. 737 : 30 Cr. L. J. 819, 1933 L. 858, 1932 O. 324. If so, what were the exact words used?

28. Did the accused point out the dead body? 1936 L. 558.

29. Whether there is sufficient corroboration of approver's testimony? 1922 L. 311,

30. Did the accused point out the place from where the property belonging to the deceased was recovered? 96 I. C. 849 : 27 Cr. L. J. 993.

31. Whether both the accused were present at the scene of occurrence with their gun, and there was no evidence as to who fired the shot? 11 C. W. N. 1085.

32. Was some important evidence withheld by the prosecution? 1932 L. 500.

33. Did the accused exercise his right of private defence? 1927 L. 286, 1927 C. 324.

34. Did the accused apprehend death or grievous hurt from the deceased? 1925 A. 319, 1929 L. 443, 1925 L. 370, 15 C. 671. (See Prem's Criminal Practice—Right of private defence).

35. Were the injuries sufficient to cause death? 1932 O. 186.

36. To what part of the body the injuries were caused? 24 I. C. 601, 1930 L. 490, 1928 L. 93.

37. What was the weapon used and to what part of the body? 13 Cr. L. J. 145, see 1931 L. 154.

38. Who gave the fatal blow? 1932 L. 189, 1931 L. 538.

39. Was the injury caused in a sudden quarrel? 1926 L. 219, 1933 L. 664,

40. Was the stolen property of the deceased found with the accused or pointed out by the accused? 1924 L. 109, 27 Cr. L. J. 993, 1936 N. 200, 1936 N. 23, 1934 N. 71.

41. Was the random blow given in the heat of fight? 1931 M. W. N. 1320.

42. Was there grave and sudden provocation? 1927 L. 729, 1923 L. 312, 29 Cr. L. J. 41, 103 I. C. 902.

43. Do the witnesses give explanation regarding the injuries caused to the accused? 27 Cr. L. J. 821.

44. What was the manner of death? Is there any doubt about it? 10 L. 876, 1930 L. 259.

45. Were the blows given on legs and other parts which are not vital? 19.9 L. 157 : 10 L. 477.

46. Was only a single blow given? 5 P. R. 1893.

47. Was the death caused by beating with hand and fist? 1933 L. 883.

48. Was the *chhavi* or axe blow given from the wrong side and not with sharp end?

#### XXVIII. In Case of Rape.

1. Was the woman a consenting party? 12 I. C. 848, 1927 L. 858, 1931 L. 401.

2. Were there any marks of resistance on the body of the accused? 1924 L. 669 : 25 Cr. L. J. 74.

3. Were there any marks of struggling with the woman? 75 I. C. 9.6, 25 Cr. L. J. 74.

4. What is the age of the accused, whether below ten years of age? 1935 R. 393, 27 A. 187.

5. Is the accused suffering from gonorrhoea or syphilis? 29 Cr. L. J. 12 : 106 I. C. 348.

6. Was the woman also suffering from gonorrhoea or syphilis?

7. What was the duration of the disease in both cases? Is it possible that the accused should have communicated gonorrhoea or syphilis to the woman?

8. Did the woman make complaint to the relatives immediately after the rape? 1925 N. 674, S. 8 (k) Evidence Act. Was the girl crying after rape? 1925 N. 74, 1926 P. 58.

9. Is the testimony of the girl corroborated by some other evidence? 1934 C. 7 : 38 C. W. N. 108.

10. Was there any vulval penetration? 1923 L. 36 : 26 Cr. L. J. 1185.

11. Was there trace of semen on the loin cloth of the man and on the garment of the woman? 1930 L. 193.

12. Is there report of the Chemical Examiner regarding the presence of semen? 1936 L. 193.

13. Is the woman of immoral character? 1926 C. 320 : 27 Cr. L. J. 263.

15. Was hymen ruptured? 1934 L. 797.

15. What was the time, place and the surroundings?

16. Was the girl more than 16 years of age? Taylor's Med. Jur., Ed. 1928, p. 130. (In such cases juries are very prone to think "there can be no smoke without fire.")

17. Was the woman of ordinary strength and in full possession of her senses? Lyon's Med. Jur., Ed. 1904, p. 247.

18. Were there any small abrasions corresponding to the finger marks about the arm. Taylor's Jur., Ed. 1928, p. 360.

19. In the Chemical Examiner's report, was the discharge of penis mixed with whitish discharge from the vagina? 1933 O. 148: 33 Cr. L. J. 298.

20. Was the woman examined medically several days after the occurrence? 1935 N. 69.

21. Were there any marks on the private part of the woman? 1935 L. 8, 36 Cr. L. J. 428.

22. Were there any marks of resistance on the aggressor? 1935 L. 8, 36 Cr. L. J. 428.

23. Is the accused impotent or physically unfit? (1896 Rep. Cr. C. 865).

24. Has the husband of the woman some grudge against the accused? Lyon's Jur., 1935 Ed., p. 375.

25. Is the prosecution lodged by the girl in order to avoid her shame by turning the pity and sympathy of her relatives and acquaintances? Criminal Investigation by Hans Gross, 1906 Ed., p. 18.

26. Was the accused charged with rape after acquittal from abduction? 1930 B. 360: 32 Cr. L. J. 205.

27. Is the woman married or subjected to intercourse?

28. Was there intercourse by husband before medical examination?

29. Was the door of the room chained from inside?

30. Was the trousers or pyjama of accused hung on some nail or peg?

31. What is the age of woman, whether too old, and what is the age of accused, whether too young?

32. Is the accused married or was his wife living with him?

33. Did the woman scream or cry before the act?

34. Did the woman enjoy the act of intercourse?

35. Was semen found in the vagina?

36. When was the woman medically examined?

37. Was the accused medically examined? 1946 A. 911, 1944 N. 245.

38. Whether defloration is due to penis or any other cause?

#### XXIX. In Case of Rioting.

1. Is the accused mentioned in the First Information Report? 107 P. R. 116; 17 Cr. L. J. 450, 31 Cr. L. J. 468.

2. Are there any injuries on the body of the accused? 1934 A. 781, 107 A. 116, 1931 A. 439, 1931 A. 712.

3. Was the accused acting in exercise of the right of private defence? 1932 P. 215.

4. Is there any uninterested evidence besides the persons who actually took part in riot? 1927 L. 617: 28 Cr. L. J. 685.

5. Is the part assigned to the particular accused falsified by medical evidence? 1927 L. 617.

6. What was the common object of the accused? 3 L. 144; 1922 L. 1.
7. Was the assault an isolated or independent one by some persons? 1933 L. 935 (2).
8. In a communal riot is there any disinterested person? 1925 A. 134, 1922 A. 314, 1932 M. W. N. 427.
9. Was the fight a sudden one? 5 N. W. P. H. C. R. 208.
10. What was the number of the accused? Were some of the five accused acquitted? 1923 L. 692, but *see* 1926 L. 521.
11. Whether the accused was maintaining his own right and enforcing it? 1927 P. 96.
12. Whether the accused was in possession of property in dispute and was maintaining his right? 1923 P. 361, 1933 P. 299.
13. Whether the accused assembled after hearing cry for help? 1928 P. 498.
14. How many people collected at the time? Who were they?
15. Who rescued the injured?

### XXX. In Case of Poisoning (to Medical Witness)

1. Did you observe any marks of violence on the body?
2. Did you observe any unusual appearance on examination of the body? If so, to what do you attribute those appearances, whether to disease, poison or other cause?
3. If the appearance was due to some poison, then to what class of poison?
4. Do you know of any disease in which the *post-mortem* appearance are similar to those observed in this case?
5. What were symptoms of the disease in the living body, if the appearance was the result of disease?
6. What are the usual *post-mortem* appearances in the case of this particular poisoning?
7. Is it not possible that the appearances may have been the result of spontaneous changes in the stomach after death?
8. What is the usual period of time after which the symptoms begin to appear after taking the poison?
9. How long a person should live after taking this poison?
10. What was the quantity of the poison discovered in the body?
11. Did you send the contents of *post-mortem* and bowels to Chemical Examiner and did you get them sealed up in your presence?
12. Did you ever give your opinion in a poisoning case before? If so, in how many cases?
13. What was the poison, that was administered in that case?

### In Case of Poisoning (To a Non-professional Witness)

1. Did you notice the symptoms of the deceased before death? When did the symptoms appear?
2. Were there any changes in the symptoms during that interval?
3. How long before the appearance of symptoms did he take his meals?
4. What did he take in his meals?

5. Did the deceased ever suffer from a similar attack before ?
6. What was the condition of the tongue ?
7. Did he complain of pain in the stomach ?
8. Did he feel very thirsty ?
9. Did he faint ?
10. Did he complain of giddiness or headache ?
11. Was there any vomiting ?
12. Was there any purge ?
13. Was he restless ?
14. Did he have any delirium ?
15. Did he have any convulsion ?
16. Did he complain of any unusual taste in his food or water ?
17. Did he complain of parching of tongue or burning in the mouth or his throat ?
18. Did he complain of his limbs getting numb ?
19. Did he complain of suffocation ?
20. Were his hands clenched ?
21. Was his head bent backward after some convulsive jerk ?
22. Did his body become stiff ?
23. Did he feel pleasurable excitement in the beginning ?
24. Were his pupils contracted ?
25. Was there any yawning or sneezing ?
26. Was there violent pain in the abdomen ?
27. Was his tongue white and shrivelled ?
28. Was the respiration difficult ?
29. Was there any blood mixed with vomiting ?

### XXXI. In Case of Strangulation

1. Did you observe any marks of violence upon the body ?
2. Were there any unnatural appearances on examining the body at the time of *post-mortem* ?
3. Whether the marks on the neck were caused before or after death ?
4. Will you describe the mark on the neck ?
5. What was the colour of the marks left on the neck ?
6. Did the marks correspond to the shape of fingers ?
7. Whether the marks were on one side of the neck or both ?
8. What were *post-mortem* appearances you observed ?
9. Was there any blood from the mouth and nostrils ?
10. Could the marks which you observed, have been caused by rope or other article now present in Court.
11. By what article, in your opinion, the deceased was strangled ?
12. Is it not a fact that if a body of a person is hanged by handkerchief, or tightly fitting collar round the neck, a mark resembling that of strangulation may be produced ?
13. Was this strangulation due to accident, suicide or homicide ?
14. Do you think that the rope produced in the Court could have supported the weight of the body ?
15. Was the pressure on the neck exercised by means of finger nails or a hard or resisting substance ?

16. Were there any abrasion on the front of the neck ?
17. What was the colour of the vomiting matter, whether black, blue or deep green ?
18. Was the deceased addicted to opium, arsenic, cocaine ?
19. Did he give out the cause of the trouble ?

### XXXII. In Sodomy or Unnatural Offence

1. Was there any delay in medical examination of the complainant ? 1932 L. 345 : 13 L. 573.
2. Is the story of the complainant corroborated by any testimony ? 73 P. L. R. 1918 : 47 I. C. 670.
3. Were there marks of violence on the anus ?
4. Were there any marks of violence on the private parts of the accused ?
5. Was there penetration of the male organ ?
6. Was the accused spent before he could thrust his organ ? 1834 S. 206.
7. Is the accused impotent ?
8. Were there stains of semen on the loin cloth of the accused or the victim ? 10 L. 794.
9. Is the place of occurrence near some road or any other place which is frequented by the public ?
10. Did the complainant cry or scream ?
11. Was there any mark of struggle on the accused or the complainant ?
12. Was any cloth torn during struggle ?
13. Does the accused habitually practice sodomy ?
14. Is the complainant a habitually passive agent ? (The skin around the anus may be found to have assumed a smooth appearance, instead of showing the usual series of folds). Lyon's Med. Jur., 1904 Ed., pp. 261-262.
15. Is the anus funnel-like or of trumpet shape ? Lyon's Jur., 1928 Ed., pp. 283-384.
16. Are there triangular sodomitic wounds ? Lyon's Jur., 1928 Ed., pp. 283-284.
17. Was there cancer about the anus or gonorrhoeal discharge from the rectum ? Lyon's Jur., 1928 Ed., pp. 283-284.
18. Have the complainant or his relations any grudge against the accused and motive to implicate him falsely ? 1926 L. 375 : 27 Cr. L. J. 593.

### XXXIII. In Theft Cases. (Under S. 379, I. P. C.)

1. Does the stolen property belong to the complainant ?
2. Does the accused claim the property under *bona fide* claim of right ? 44 C. 66, 1929 P. 86, 1935 S. 115, 1935 A. 214, 1935 C. 675.
3. Was there consent by the person in charge of the property ? 4 C. 366.
4. Was the property removed forcibly with a view to realize legal dues ? 1921 P. 390 : 22 Cr. L. J. 224.

86. 5. Was the property taken away openly ? 1934 P. 491, 1929 P. 86.
6. Did the accused take away the property which jointly belonged to him ? 10 M. 186, 1 Weir 79.
7. Did the servant act under the orders of his master ? 12 Cr. L. J. 7.
8. Was the property *res nullius* ? 8 A. 51, 9 A. 348, 17 C. 852.
9. Was the possession recent and exclusive ? 129 S. 9, 29 Cr. L. J. 924.
10. Is the property identifiable ? 194 P. L. R. 1912.
11. Were distinctive names of the stolen goods given in the list of stolen articles ? 1921 P. 490.
12. Were the stolen goods of common pattern ? 1923 L. 36, 22 P. W. R. 1912.
13. Were the stolen articles of ordinary make and there was nothing peculiar in them ? 13 Cr. L. J. 555, 81 I. C. 48.
14. Did the stolen property consist of crops and grain ? 57 I. C. 113.
15. Did the stolen property consist of cloth ? 1922 A. 24, 1 L. 102.
16. Did the stolen property consist of cash and coins ? 1926 S. 17 : 26 Cr. L. J. 1315.
17. Do the stolen articles consist of ornaments of common pattern ? 1926 L. 132 : 26 Cr. L. J. 1361.
18. Is the stolen article sugar or wheat ? 9 P. 606, 94 P. L. R. 1912.
19. Whether shoe left at the place of occurrence belongs to the accused and whether it can be identified ? 1935 L. 805.
20. Were the foot-prints of the accused covered ?
21. How long after the theft were the foot-prints covered and compared with those of the accused ? 1932 L. 557 : 33 P. L. R. 691.
22. Whether the identification of foot-prints of the accused was with shoes ? 73 I. C. 331 : 24 Cr. L. J. 587.
23. Did the track of the accused lead to his village ? 33 P. R. 1868.
24. Has the tracker knowledge about the varieties of foot-prints ? (See Prem's Criminal Practice—Foot-prints).
25. Was the stolen property found in a place accessible to others ? e.g., a tank or jungle or verandah or a street. 1929 M. 846, 1923 L. 438 (2) : 26 Cr. L. J. 257, 1925 A. 476 : 26 Cr. L. J. 1022.
26. Was the stolen property recovered from a place not belonging to the accused ? 1930 L. 91, 1934 N. 54, 1938 M. 846.
27. Was the accused living jointly in the same house with others ? 9 Cr. L. J. 52, 6 B. 731.
28. Was the property found in a shed which was at some distance from the house ? 10 B. 319, 1932 S. 180.



29. Did the accused merely point out the place where the stolen property was concealed? 1921 L. 385, 20 P. R. 1905, 1934 S. 159, 1930 S. 168.

30. Did the accused merely produce the stolen property from a jungle? 1923 L. 438, 46 P. L. R. 1912.

31. Did the accused point out the place of occurrence? 1929 L. 794.

32. Was the accused in a custody as well as accused in the case when he made a statement which resulted in the discovery of stolen property? 1928 P. 491, 1931 L. 278.

33. Were the places and things discovered already known to the Police before the accused pointed out the place? 1929 N. 35, 1934 L. 786, 1930 S. 225, 1929 S. 250.

34. Was the property already discovered in consequence of information from another suspected person? 1922 L. 315, 1929 S. 350.

35. Was the place pointed out jointly by several accused? 1927 L. 739, 1932 C. 297.

36. Was the search of the accused's house conducted in the presence of respectful witnesses of the locality? 1925 R. 205, 15 Cr. L. J. 441, 18 Cr. L. J. 1009.

37. Was the person who entered the house to make a search got his own person searched? 1933 O. 305.

38. Was the search conducted in the presence of the occupant of the house? 41 C. 350.

39. Was the search list signed by the witnesses? 4 L. B. R. 134, 11 Cr. L. J. 453.

40. Was the Police Officer authorised to make the search under S. 165, Cr. P. C. ? 38 A. 14, 6 Cr. L. J. 439.

#### XXXIV. In Case of Receiving Stolen Property. (S. 411, I. P. C.)

1. Was the stolen property found in a house jointly occupied by several persons? 1922 A. 83, 57 I. C. 913, 67 I. C. 588.

2. Was the stolen property in a room with no shutters and accessible to the members of the accused family? 1925 A. 478 : 47 A. 521.

3. Was the stolen article of such a nature that it may be changing hands? 1921 L. 89.

4. How long after the theft, the stolen property was found with the accused? 1921 L. 89, 1923 M. 365, 1923 L. 460, 1926 L. 528.

5. Is the property proved to be stolen property? 52 C. 223 : 1925 C. 666.

6. Did the accused merely point out the place where the stolen property was found? 1930 S. 168.

7. Was the stolen property pointed out in a place which did not belong to the accused? 17 A. 576, 46 P. L. R. 1912, 1 P. R. 1917 (Cr.), 1930 L. 91, 1935 L. 475.

8. Has the accused got a receipt for the purchase of the alleged stolen article and was in possession of the same for several months? 1936 . 38.

9. Has the accused failed to disclose the names of the thieves from whom he purchased the property ? 1933 L. 596 (2).

10. Did the accused give a false account or failed to give account of the possession of the stolen property ? 1931 P. 85.

11. Does the accused claim the alleged stolen property although he has failed to prove the claim ? 53 C. 157.

12. Was the stolen property capable of identification ? 26 Cr. L. J. 1315, 16 Cr. L. J. 440.

13. Was the list of stolen property given to the Police after the F. I. R. or at the time of making the F. I. R. ?

14. Was the stolen jewellery melted into an ingot ? 39 P. R. 1881.

15. Is the stolen property *res nullius* ? 9 A. 348, 17 C. 557, 18 B. 212.

16. Was the stolen property sold by accused in open market ?

17. Was it sold for full value or for nominal price ?

18. Did the accused give wrong description of himself, his father and the place of his residence, when selling the property ?

For other questions, see Model Questions in Case of Theft.

#### XXXV. Regarding Track Evidence or Footprints

1. How long after the occurrence the footprints were covered ? 1932 L. 557

2. How many people collected at the scene of occurrence, when alarm was raised ?

3. When was the tracker called and when did he arrive ?

4. Was the ground soft or hard or sandy ?

5. Has the tracker any scientific knowledge of footprints ?

6. Was the measurement taken by foot rule or by hand (fingers) ?

7. How long after the theft were footprints compared ? 1933 L. 299.

8. Was the impression that of bare foot or booted foot ?

9. Was the impression that of a person while walking or running or with burden ? See Prem's Criminal Practice—"Footprints".

10. Were the footprints of a person with shoes ? 24 Cr. L. J. 587.

11. Has the tracker any previous experience of the identification of footprints ?

12. Was any block made of the footprint ?

#### XXXVI. To Handwriting Expert

1. How long you have been a handwriting expert ? From whom you have learnt the subject of handwriting and for how long ?

2. Can you read and write the language of the document examined by you ? 1933 P. 559.

3. Did you compare the questioned document with a signature or some other writing ? 1925 C. 485.

4. Whether the forgery was traced or free-hand ?

5. Was the questioned document compared with some writing admitted or proved to be genuine ? 1932 B. 588, 53 C. 372, 37 C. 467.

6. Is your evidence contradicted by another expert ? 1933 L. 885, 1939 O. 213.
7. What is the age of disputed writing ? 36 M. 159. Please give reasons.
8. What are the chief similarities and dissimilarities in the handwriting ? 1921 P. C. 168.
9. How many writings have you compared since you started this profession ?
10. In how many cases your evidence was believed and in how many cases disbelieved ?
11. Did you make enlarged photograph of these documents yourself ?
12. Did you submit a report ? If so, to whom and on what date ?
13. How many writings of this particular language did you compare during your professional career ?
14. Can you explain the difference in the formation of i's, t's or h's (as the case may be) in the questioned document ?
15. Was the alignment of the writing ascendant, descendant, even, irregular or arched ?
16. Was the arrangement of the letters regular or irregular ?
17. What was the sizing of particular letters in regard to one another ?
18. Was the sizing automatic ?
19. Whether the writer kept up the relative sizing of letters in words, although written large or small ?
20. Was the sizing regular or irregular, wide or narrow, large, medium or small ?
21. Was the writing rapid or slow ?
22. Was the writing regularly or evenly or irregularly spaced ?
23. Was the spacing extravagant, wide, medium, close or cramped ?
24. What was the exact width of spacing ?
25. Did you measure the spacing from letters to letters or from the end of the final stroke to the beginning stroke ?
26. Was the spacing automatic ?
27. Was the pen presentation vertical or angular ?
28. What is the angle at which the pen was held towards the paper ?
29. Was the pen pressure light, heavy, medium, even, uniform or shaded ?
30. What was the form, intensity, frequency and exact location of the shading caused by the pressure of the pen ?
31. What was the execution or speed in writing ?
32. Whether speed was laboured, slow and drawn, slow and deliberate, average, rapid or very rapid ?
33. What was the direction or slant in writing ?
34. Was the style linear, oval, round, angular or square ?
35. What was the finger movement ?
36. Was the style the result of combined action of the finger and wrist -- the finger predominating ?
37. Could the writer write a word or combination of more than five letters or characters in a single operation ?
38. Were the curves regular or irregular in different places ?

## XXXVII. In Suit for Accounts and on Account Books

1. Are the account books regularly kept ?
2. Is the account kept according to the set rules and current routine or set practice of a person ? 1925 N. 407.
3. Were the entries made from day to day or hour to hour. 27 C. 118 (P. C.), 1927 P. 61, 1926 N. 407.
4. Who wrote the account books ?
5. Is the writer of the account books alive ?
6. Are the accounts in the form of memorandum not regularly kept in the course of business ? 1930 N. 24.
7. Was the account totalled every day ? 1921 N. 133.
8. When is the ledger prepared from the day book ?
9. Did the writer of the account books have personal knowledge of the fact stated ?
10. Were there blank spaces left in the account books ? 1939 L. 412.
11. Are the account books stitched and made in the form of *Bahi* or ledger and bound together ? 1936 M. 871, 23 I. C. 893.
12. Are there incorrect entries and mistakes in the account books ? 1932 O. 225.
13. Are there bogus entries in the account books ? 1928 P. C. 39.
14. How long after the fact or transaction entries are made in the account books ? 5 P. 777.
15. Were the accounts prepared by the book-keeper from only the memorandum supplied by the plaintiff ?
16. Who is the accounting party ?
17. Is the account book marked with pages ?
18. Does the account book show that some pages have been substituted ?
19. Is the ink of the substituted pages different ?
20. Are the expenses incurred in connection with a previous suit, entered in the account book ?
21. Are the travelling expenses of the plaintiff entered ?

## XXXVIII. In Adoption Cases

1. What ceremonies were held at the time of adoption ?
2. Are the parties governed by Hindu Law or custom ?
3. Was Dutta Homam performed ?
4. Was the ceremony of giving and taking performed ? 1936 C. 1.
5. Was there a deed written at the time of adoption ? 1936 P. C. 304.
6. Was the boy actually delivered to the person adopting him ? 40 P. L. R. J. & K. 42
7. Was the boy treated as son after adoption ? 21 C. 997 (P. C.), 6 C. 926 (P. C.).
8. Was there any entry in the register maintained by Primary School Authorities ? 1934 N. 1.
9. Was the boy shown as a son of the adoptive father in the application for admission to a school ? 1934 N. 1.
10. Did the monthly progress report of the school mention the boy as the adopted son of the party ?

11. Can the person be legally adopted ?
12. Was there any agreement with the natural father for payment of money ? 26 I. C. 779, 51 I. C. 280.
13. Was the agreement entered into by the natural father, ratified by the adopted son ? 1931 M. 804 ; 135 I. C. 903, 13 A. 1391.
14. Was any property alienated in favour of the adopted son ?
15. Was the deed of adoption attested by the sons of natural father ?
16. Was the deed of adoption and of gift attested ? (It does not require attestation in the Punjab). 1939 L. 414.
17. Did the widow possess authority to adopt ? 47 C. 1012, 49 C. 1, 7 P. 245, 55 A. 78.
18. Was any legitimate son born after adoption ? (Legitimate son in such case gets 1/4th share in the father's estate). 1939 B. 766, 17 B. 100.
19. Did the widow obtain the son of Spindas ? 1937 M. 110.
20. Whether the adopted son was given by father, mother or any other relative ? 33 B. 107, 11 M. 43, 30 C. 965, 2. P. 469.
21. How long before the date of the suit did adoption take place ? 5 M. 40.
22. Was there any statement in the will by the adoptive father as to the factum of adoption ? 5 P. 779.
23. Did the adopted son perform *pindas* for the adoptive father or for the natural father ? 168 I. C. 993 (P. C.).
24. Was there any declaration by the adoptive mother as to adoption of a person ? 1934 A. 406.
25. Was any Panchayat held at that time ?
26. Were sweets distributed at the time of adoption ?
27. Was any grandson living at the time of adoption ? 46 B. 455.
28. Was any legitimate son living at the time of adoption ? 48 M. 1.
29. Did the adopted boy belong to the same caste as the adoptive father ? 46 A. 137.
30. Could the adoptive father legally marry the mother of the boy 11 M. 49, 21 M. 412.

(As to who may be taken in adoption, see Prem's Laws of India, p. 246)

### XXXIX. In Case of Benami Transaction.

1. What is the market value of the property sold and how much it entered in the deed ?
2. What is the source of purchase money ? 1931 L. 419 : 12 L. 546, 3 A. 557 (P. C.), 18 C. W. N. 428 (P. C.), 1928 M. 708.
3. Whether the ostensible purchaser had money in Bank or with him according to his account books ?
4. Whether the consideration is adequate ? 1924 C. 523.
5. Who is in possession or enjoyment of the property since the purchase ? 1924 C. 523 ; 81 I. C. 667.
6. Who is paying for the improvements effected on the property ?
7. Who pays the land revenue or other cesses regarding the land ?
8. Who has got the custody of title-deeds ? 1924 C. 523.
9. Is the transaction for the benefit of true owner ? 1939 S. 9.
10. Has the original draft of the deed been produced ? (If the transaction is old and documents are many, non-production of original draft immaterial) 1939 C. 244.
11. Has the actual executant lent his name to the real party to the contract ? 57 I. C. 689.

